Supreme Court
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NO. 99-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

EASTMAN KODAK COMPANY,

Petitioner,

v.

MYRTLE THOMAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI.

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January 4, 2000

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169 pr

QUESTION PRESENTED

For the purposes of calculating the Title VII limitations period, does an alleged "unlawful employment practice" under that Statute's section 5(e)(1) occur: (a) when the employee first knew or believed that her annual performance appraisal scores were adversely affected by unlawful discrimination; or (b) only when the employee suffers "concrete harm" attributable to the allegedly discriminatory performance appraisals, when they are subsequently utilized in an objective formula resulting in the employee being selected for layoff.

PARTIES TO THE PROCEEDING

The appellant in the court of appeals (plaintiff in the district court) was:

Ms. Myrtle Thomas

The appellee below (defendant in the district court) was:

Eastman Kodak Company

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Eastman Kodak Company ("Kodak") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a) is reported at 183 F.3d 38 (1st Cir.1999). The order of the district court (App. 54a) is reported at 18 F.Supp.2d 129 (D.Mass. 1998).

JURISDICTION

The district court had subject matter jurisdiction pursuant to 42 U.S.C. § 2000e-5(f) and 28 U.S.C. §§ 1331 and 1343(4). The court of appeals had subject matter jurisdiction pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The First Circuit Court of Appeals issued its opinion on July 15, 1999. On July 29, 1999, the court of appeals granted Kodak an extension up to August 30, 1999, to request *en banc* review. Kodak's timely filed petition for *en banc* review was denied on October 6, 1999.

STATUTORY PROVISIONS INVOLVED

The relevant portions of Title VII, 42 U.S.C. § 2000e, *et seq.*, are reproduced at App. 122a.

STATEMENT OF THE CASE

At issue in this case is the holding of the United States Court of Appeals for the First Circuit, that allegedly discriminatory Performance Appraisal ("PA") ratings from 1990, 1991 and 1992 were not actionable under Title VII until they were used in 1993 as part of an admittedly nondiscriminatory process to select approximately 100 employees for layoff throughout North America, including the Respondent. Even though the Respondent believed that her PA ratings were motivated by racial animus at the time they were given, and even though she did not receive a pay increase in 1990, the First Circuit held that the Title VII limitations period did not begin to run until the PA scores resulted in "concrete, negative consequences," meaning her subsequent layoff in 1993. Although Ms. Thomas filed her Title VII claim more than 300 days after her last PA, the First Circuit held that her ultimate layoff was the "unlawful employment practice" that determined the accrual date of her claim.

Plaintiff and Respondent, Myrtle Thomas, brought this Title VII disparate treatment action against her former employer, Kodak, contending that her selection for layoff in 1993 was unlawfully motivated by her race. When Kodak decided in 1993 to reduce its North American workforce, it used a Performance Appraisal Ranking ("PAR") process which weighted the employee's last three PA ratings according to a formula. Based upon the application of this formula to the numerical ratings from her 1990, 1991 and 1992 PAs, Ms. Thomas was one of two people in her customer service unit selected for termination.

After substantial discovery in the district court, Kodak sought summary judgment. Although she had previously contended that her selection for layoff under the PAR process was motivated by discriminatory animus and that the

PAR process was itself a pretext for unlawful discrimination, Ms. Thomas presented a new theory of her case in her opposition to Kodak's motion. For the first time since the inception of the action, Ms. Thomas contended that she could prove her Title VII claim by showing that her PA ratings from 1990, 1991 and 1992 were unfairly low because the person evaluating her was motivated by racial animus.

By way of a Supplemental Memorandum, Kodak contended that this new theory was invalid, in that the 1990-1992 PAs could not be used to prove that Ms. Thomas' 1993 termination was discriminatory because they fell outside the limitations period for bringing a Title VII claim. Although disagreeing with Kodak's position on this point, the district court allowed Kodak's motion, finding that Ms. Thomas could not meet her burden of proving that she was the victim of any unlawful discrimination. *Thomas v. Eastman Kodak Company,* 18 F.Supp.2d 129 (D.Mass. 1998).

Ms. Thomas then filed an appeal, and the First Circuit Court of Appeals reversed the district court's judgment by an order dated July 15, 1999. *Thomas v. Eastman Kodak Co.,* 183 F.3d 38 (1st Cir.1999). The First Circuit held that Ms. Thomas could prove that Kodak's method of selecting her for layoff was the "unlawful employment practice" by showing that her prior performance appraisals, all rendered beyond Title VII's limitations period, were unfairly low because they were tainted by unlawful discrimination.[1] That court held that even if Ms. Thomas believed she had been discriminated against at the time the PA ratings were given, because she had not suffered any "concrete, tangible conse-

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[1]The *Thomas* court also held that the district court erred in finding that Ms. Thomas had failed to present sufficient evidence of discrimination to have her case decided by a trier of fact, and Kodak does not challenge that ruling herein.

quences" of the alleged discrimination until she was laid off, her Title VII action did not accrue until Kodak utilized the PAs to select her for layoff in 1993.

In reaching its decision, the *Thomas* court relied upon *Johnson v. General Electric Co.*, 840 F.2d 132, 134 (1st Cir.1988), a case upholding a 12(b)(6) dismissal where the plaintiff contended that "a review process was designed to prevent the plaintiff from qualifying" for a promotion. Ultimately, the crux of the *Thomas* court's holding on the timeliness issue was that:

> A trier of fact could, but need not necessarily, conclude that Thomas had notice of the appraisals' possible racial bias as soon as they were presented to her. However, this fact does not go to the relevant question under *Johnson's* notice rule: whether Thomas had notice of immediate, tangible consequences of her poor scores. Kodak's argument pertains to notice of bias, rather than the notice of harm required under *Johnson.* But notice of bias alone, absent harm, is clearly not sufficient under *Johnson.*
>
> We hold that the performance appraisals Thomas received in 1990, 1991 and 1992 did not trigger the statute of limitations in § 2000e5(e)(1) at the time they were presented to Thomas, because they did not initially have any crystallized implications or apparent tangible effects.

Thomas v. Eastman Kodak Company, supra, 183 F.3d at 55 (footnote omitted). Kodak sought *en banc* review because

the *Thomas* panel's ruling was error, being contrary to applicable precedents of this Court and prior decisions of the First Circuit, all of which make clear that the consequences of discrimination do not constitute or affect the accrual date of a Title VII cause of action under such circumstances. Kodak's Petition for Review *en banc,* ultimately denied, contended that by ruling as it did, the *Thomas* court ignored the clear distinction between an act of alleged discrimination (here, the rendering of a "tainted" performance appraisal) and its later consequences (Ms. Thomas' layoff).

REASONS FOR GRANTING THE WRIT

This Court has consistently held that it is the date of the allegedly discriminatory conduct — not the date that any consequences of such conduct become most painful — that triggers the running of the Title VII limitations period. *Delaware State College v. Ricks,* 449 U.S. 250 (1980), *United Air Lines, Inc. v. Evans,* 341 U.S. 553 (1977) and *Lorance v. AT&T Technologies,* 490 U.S. 900 (1989). The *Thomas* court erred in adopting a notice rule based upon *Johnson v. General Electric Co., supra,* that allowed Ms. Thomas to "reach back" and challenge her prior, time-barred, performance evaluations as being tainted by unlawful discrimination, even though she believed that she had been discriminated against when they were rendered, but failed to act at that time. The *Thomas* court's holding — that a discriminatory performance appraisal is not an "unlawful employment practice" that triggers the running of the limitations period unless it had "tangible, concrete effects that were apparent to the plaintiff" — is manifestly wrong. It is well-settled that Title VII's limitations period begins to run from the date of the "unlawful employment practice," and not

from the date that any consequences are felt by an aggrieved employee. Nevertheless, the First Circuit has added a requirement that there be "concrete, negative consequences" of the allegedly discriminatory conduct before the limitations period will begin to run. This is in direct conflict with this Court's holdings in *Ricks, Evans* and *Lorance,* as well as the First Circuit's own previous decisions.

In essence, the First Circuit's *Thomas* decision stands for the proposition that there can be discrimination without any corresponding harm, and multiple accrual dates for a Title VII cause of action. This is contrary to the remedial purpose of Title VII, and conflicts with this Court's precedents and decisions from other circuits, which all hold that it is the discriminatory act, not the consequences of the act, that triggers the limitations period. Because the 1990, 1991 and 1992 PAs were given more than 300 days before the Respondent filed her Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC"), and because she believed at the time the PA ratings were given that they were the product of discrimination, she cannot now "reach back" and challenge her ratings.

In addition, Kodak relied on the PAs in good faith in selecting Ms. Thomas for layoff. The *Thomas* decision deprives Kodak of the protections established by *Stoller v. Marsh,* 682 F.2d 971 (D.C. Cir.1982), holding that an employer is not liable under Title VII for subsequently relying in good faith on evaluations which were not previously challenged by the employee, even though the employer had in place a process that enabled the employee to do so. Given the Respondent's failure to make use of Kodak's "Open Door" policy to challenge the offending ratings, Kodak was therefore entitled to rely on the ratings in selecting Ms. Thomas for layoff in 1993.

Finally, the record contains evidence that there were "tangible, concrete consequences" of the 1990 PA, because Ms. Thomas received no salary increase that year. Thus, even if this standard is applied, her claim accrued then, and is now barred. Moreover, this fact, and the First Circuit's analysis that it was an "unrelated harm" to her eventual layoff, demonstrates that the *Thomas* court improperly designated what *Ricks* would consider a "consequence" as an "unrelated harm," which Kodak contends exalts nomenclature over substance.

The *Thomas* court's decision, if upheld, would trigger the accrual of the limitations period only if the employee could anticipate the precise *degree* of the adverse future *consequences* of the alleged discrimination. This has never been the proper method for determining the accrual date of Title VII's limitations period, because it depends upon the employee's subjective appraisal of an inherently unpredictable outcome. Thus, the Title VII limitations period is rendered a nullity.

I. THE DECISION BELOW IS DEMONSTRABLY WRONG AND CONFLICTS WITH THIS COURT'S PRECEDENTS.

The *Thomas* court premised its ruling on the limitations issue on its reading of three Supreme Court cases: *Delaware State College v. Ricks,* 449 U.S. 250 (1980); *United Air Lines, Inc. v. Evans,* 341 U.S. 553 (1977); and *Lorance v. AT&T Technologies,* 490 U.S. 900 (1989). After a brief synopsis of each of the cases, the *Thomas* court held that:

> Read together, this trilogy defines a notice rule: an employer action only triggers the run-

> ning of the statute of limitations if that action has concrete, negative consequences for an employee and the employee is aware or should have been aware of those consequences.

Id., 183 F.3d at 49.

Implicit in this ruling is the notion that the "unlawful employment practice" was not the performance appraisals given to Ms. Thomas, but rather, her ultimate layoff engendered by those PAs' scores under Kodak's neutral and non-discriminatory PAR process.[2] The *Thomas* court characterized her theory as being "that the PAR process was illegitimate under Title VII *in a derivative way*, because its calculations were based on discriminatory appraisal scores." *Id.*, 183 F.3d at 48 (emphasis supplied).

This reasoning cannot withstand a proper reading of the *Ricks, Evans* and *Lorance* trilogy, which hold that the consequences of discrimination cannot be the accrual date of Title VII's limitations period. The *Thomas* court's ruling, predicated upon Ms. Thomas' supposed ignorance of the "tangible consequences" of the offending PAs, is irreconcilable with the thrust of the *Ricks, Evans* and *Lorance* trilogy, which distinguishes an "unlawful employment practice" from the "consequences" of discrimination.

In *Ricks,* a denial of tenure case, this Court addressed the issue of the limitations period commencing on the date of a discharge, and squarely rejects the *Thomas* court's analysis:

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[2] Both parties acknowledge that the PAR process was not itself a pretext for discrimination, nor formulated as a pretext. *Thomas,* 183 F.3d at 48. *And see,* 18 F.Supp.2d at 135.

> In order for the limitations periods to commence with the date of discharge, Ricks would have had to allege and prove that the manner in which his employment was terminated differed discriminatorily from the manner in which the College terminated other professors who also had been denied tenure.
>
> . . . . .
>
> Congress has decided that time limitations periods commence with the date of the "alleged unlawful employment practice." *See* 42 U.S.C. § 2000e-5(e). Where, as here, the only challenged employment practice occurs before the termination date, the limitations periods necessarily commence to run before that date.

Ricks, 449 U.S. at 258, 259 (footnote omitted). Thus, *Ricks* expressly rejects the proposition advanced by the *Thomas* court, that the limitations period is delayed because an "unlawful employment practice" can occur "in a derivative way" by a subsequent, non-discriminatory act such as Kodak's PAR process.

In *Lorance,* this Court discussed *Ricks* and *Evans* and noted that:

> We concluded [in *Ricks*] that "[t]he proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences became most painful."
>
> . . . . .
>
> Like *Evans,* petitioners in the present case have asserted a claim that is wholly dependent on discriminatory conduct occurring well out-

> side the period of limitations, and cannot complain of a continuing violation.

Lorance, 490 U.S. at 907-08.

The *Lorance* Court was guided by its decision in *Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385 (1982), an unfair labor practice case. Discussing the impact of *Zipes*, this Court noted:

> We found, however, that "the entire foundation of the unfair labor practice charged was the Union's time-barred lack of majority status when the original collective-bargaining agreement was signed," and that "[i]n the absence of that fact enforcement of this otherwise valid union security clause was wholly benign." *Id.*, at 417. "[W]here a complaint based upon that earlier event is time-barred," we reasoned, to permit the event itself "to cloak with illegality that which was otherwise lawful" "in effect results in reviving a legally defunct unfair labor practice." [citation omitted] This analysis is squarely on point here. Because the claimed invalidity of the facially nondiscriminatory and neutrally applied tester seniority system is wholly dependent upon the alleged illegality of signing the underlying agreement, it is the date of that signing which governs the limitations period.

Lorance, 490 U.S. at 910-11.

A proper reading of the *Ricks, Evans* and *Lorance* trilogy is found in the dissenting opinion of the Third Circuit case of *Colgan v. Fisher Scientific,* 935 F.2d 1407, 1426-27 (1991)

(*en banc*), *cert. denied,* 502 U.S. 941 (1991)[3]. There, Judge Cowen carefully analyzes the *Ricks, Evans* and *Lorance* trilogy and cogently discusses three propositions directly on point here: (1) the fact that *Lorance* expressly rejected the notion of a mere possibility of harm as failing to trigger the running of the statute of limitations (*Id.*, 935 F.2d at 1424-25); (2) that an employee *does* have a cause of action for an offending evaluation, even if the actual future consequences are unknown (*Id.* at 1426); and (3) that *Ricks* was the reversal of a Third Circuit decision that had posited potential workplace disruption as warranting a later accrual date, and thus the Supreme Court had implicitly rejected this as a rationale for clouding the accrual of the limitations period (*Id.*, 1427-28).[4]

In *Mohasco Corp. v. Silver,* 447 U.S. 807 (1980), this Court recounted the legislative history of Title VII and noted:

> By choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination. . . . We must

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[3] Kodak's research in response to Ms. Thomas' new theory disclosed *Colgan* as the only apparently analogous case, which was disclosed to the district court at oral argument. *See,* 18 F.Supp.2d at 133, n.5. The district court and the First Circuit considered *Colgan* in their decisions, and it is therefore given treatment here.

[4] This was one of the reasons offered by the *Thomas* court as warranting a later accrual date for the statute of limitations. *Thomas*, 183 F.3d at 51. However, this is inconsistent with case authority that holds Title VII creates a cause of action for receipt of a biased employment evaluation even if the employee could not demonstrate that the evaluation caused him to be denied a promotion or a specific job. *Smith v. Secretary of the Navy,* 659 F.2d 1113 (D.C. Cir.1981).

> respect the compromise embodied in the words chosen by Congress. It is not our place simply to alter the balance struck by Congress in procedural statutes by favoring one side or the other in matters of statutory construction.

Id. at 826 (footnote omitted).

Indeed, one commentator has noted that the limitations period was "designed both to guarantee 'the protection of the civil rights laws to those who promptly assert their rights and to protect employers from the burden of defending claims arising from employment decisions that are long past.'" Hitchcock, "Coherence Out of Chaos: Interpreting Section 706(e) of Title VII," 33 Emory L.J. 1027, 1028-29 (Fall 1984), citing *Delaware State College v. Ricks, supra,* 449 U.S. at 258; and discussing *Crown, Cork & Seal Co. v. Parker,* 462 U.S. 345, 352 (1983); *United Air Lines, Inc. v. Evans,* 431 U.S. 553 (1977); *Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454, 463-64 (1975).

Buttressing Kodak's position is *Fernandez v. Chardon,* 648 F.2d 765 (1st Cir.1981), where the plaintiffs were non-tenured administrators with Puerto Rico's Department of Education who in June 1977 were notified by letter that they would be demoted or terminated between June 30 and August 8, 1977. In June of 1978, two of the employees filed suit in federal court alleging violations of 42 U.S.C. § 1983. The district court dismissed the actions because they were not filed within the applicable statute of limitations.

The First Circuit reversed, holding that the cause of action accrued on the date that the demotions and terminations "took effect." *Id.*, 648 F.2d at 767. The court distinguished *Ricks* by stating that "[n]o actual harm is done until the threatened action is consummated. Until then, the act which

is the central focus of the plaintiffs' claim remains incomplete." *Id.* at 770.

This Court reversed the First Circuit's holding *sub nom Chardon v. Fernandez,* 454 U.S. 6 (1981) (*per curiam*). Finding *Ricks* to be indistinguishable, the Court reiterated its prior holding that the "proper focus" is on the time of the discriminatory act, "not the point at which the consequences of the act become painful." *Id.* at 8. "The fact of termination is not itself an illegal act." *Id.*

In a dissent, Justice Brennan expressed a concern that lawsuits should not be filed "until some concrete harm has been suffered . . .". *Id.* at 9. This is precisely what the *Thomas* court said in holding that Ms. Thomas' claim did not accrue until the allegedly discriminatory PAs were used as part of the PAR process to select her for layoff, but is a proposition squarely rejected by this Court.

Notwithstanding the acknowledgment that the PA process was an integral tool used by Kodak to determine all manner of actions affecting an employee such as Ms. Thomas, the *Thomas* court nevertheless held that:

> According to Kodak's compensation plan, appraisal scores were intended to affect salary levels and determine "who should be promoted, transferred, laid off, and reemployed." It is not clear whether Kodak informed employees of this intention. But even if employees were familiar with the intended possible uses of the scores, it appears that the effects listed in the compensation plan remained abstract — mere possibilities, not certainties.
>
> . . . . .

> But the appraisals did not specify that Thomas was to suffer an immediate consequence for her alleged performance failures, much less that they would mechanically lead to her being laid off. Because Thomas seeks to recover for an allegedly discriminatory layoff, we consider whether that particular consequence was apparent at the time Thomas received the appraisals. . . . She was not told that layoffs were impending and that her scores placed her at a high risk of layoff.

Id., 138 F.3d at 54, 55 (emphasis supplied).

Given that nobody knew of the 1993 layoffs when Ms. Thomas received her 1990-1992 PA scores, this reasoning is inapposite to the proper inquiry: whether Ms. Thomas knew or should have known that she had suffered unlawful discrimination when she received the PAs. Furthermore, given the First Circuit's acknowledgment that the PAs' purpose is to determine "who should be promoted, transferred, demoted, terminated or laid off," it is manifest that once she received what she considered to be a PA tainted by discrimination, Ms. Thomas was "on notice" that she had a Title VII claim. The *Thomas* court's ruling and underlying reasoning would only trigger the running of the limitations period if an employee could subjectively appreciate and precisely predict each and every likely possible future adverse consequence of a discriminatory act. Applying this flawed reasoning to the instant case, it would mean that because Ms. Thomas could not have known the precise future date that the offending PAs would or could cause her to be laid off, she had no remedy under Title VII, nor any obligation to pursue a claim within the 300 day limitations period after receipt of a PA she believed tainted by discrimination. This has never been

the proper construction of Title VII's limitations period, nor this Court's reasoning in prior cases.

The *Thomas* court then went on to formulate a "notice rule" based upon a case analogous to the *Colgan* majority, *Johnson v. General Electric,* 840 F.2d 132, 134 (1st Cir. 1988). *Johnson* was decided before *Lorance,* and thus is suspect authority on this issue. *Johnson* was an appeal of a Rule 12(b)(6) dismissal, and the *Thomas* court predicated its notice standard on the following *dictum*:

> Reading the complaint, as we must, as a whole and in the light most favorable to the plaintiff, we cannot say that he is not complaining about the promotion denial in February in addition to the unfair review process in the preceding summer. Even if the event in February is in some sense a "consequence" of the earlier discrimination, *it is also alleged to be an independent discriminatory act in and of itself.* The testers' alleged discriminatory animus becomes "background" material "which might make the [subsequent] decision [not to promote] discriminatory." *Stoller v. Marsh,* 682 F.2d 971, 978 (D.C. Cir.1982).

Johnson, 840 F.2d at 137 (emphasis supplied).

Contrary to the above rationale, Ms. Thomas' prior PAs are not being proffered as mere "background," but are the direct evidence of discrimination she seeks to use to prove her case. Unlike the instant case where the PAR process is acknowledged to be free from any unlawful discrimination (*see* footnote 2, *supra*), plaintiff in *Johnson* expressly contended that "[T]his artificial process was racially motivated and biased against him." *Id.* It was this allegation, which had to be ac-

cepted as true,[5] that enables *Johnson* to stand for the proposition that the subsequent use of a prior evaluation can be both a consequence of prior discrimination, as well as an "independent discriminatory act in and of itself." *Johnson* is thus inapposite to the instant case. Furthermore, even if *Johnson* has vitality after *Lorance,* it cannot enable Ms. Thomas to have two accrual dates for the limitations period — selecting the one most convenient or strategically advantageous (even years after the fact). The *Thomas* court necessarily and implicitly embraced this flawed notion of multiple accrual dates, by holding that her subsequent layoff was the "unlawful employment practice" under § 2000e-5(e)(1) that commenced the running of the limitations period for Ms. Thomas' claim. *See* 138 F.3d at 48. This ruling, and its underlying reasoning, renders the limitations period meaningless.

A. The First Circuit's Decision Cannot Be Reconciled with That Court's Prior Precedents That Correctly Interpret and Apply *Ricks, Evans* and *Lorance.*

Following precedent set by this Court, the First Circuit has consistently held that the consequences of discrimination are not the focal point of the analysis for determining the accrual of the limitations period. It is thus incongruous for the *Thomas* court to adopt a standard that is even broader than ever afforded a litigant who sought to relax Title VII's accrual date based upon the unknown consequences of a discriminatory act by an employer. In *Jensen v. Frank,* 912 F.2d 517 (1st Cir.1990), the First Circuit rejected an employee's serial violation claim based upon the employee's

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[5] *Johnson* was an appeal of a Rule 12(b)(6) dismissal.

purported inability to previously discover all of the facts that would support the claim:

> But, this argument is a mere heuristic, confusing notice with evidence and overlooking the very purpose of the administrative requirement that timely contact be made. Not knowing every detail of a suspected plot cannot excuse a discharged employee for sleeping upon his rights.

Id., 912 F.2d at 521.

In response to the plaintiff's contention that the continuing ***effects*** of the discrimination lingered, and thus enabled the plaintiff to pursue a claim years after the alleged violation, the *Jensen* court stated:

> It is beside the point that Jensen continued to feel the effects of the firing in 1984 and beyond. In general, Title VII's temporal restrictions are measured from the occurrence of a triggering event; that the event's sequelae linger does not coterminously extend the limitation period. In the rather modest garden where continuing violation jurisprudence may lawfully flourish, courts must be careful to differentiate between discriminatory acts and the ongoing injuries which are the natural, if bitter, fruit of such acts. *See, e.g., Delaware State College v. Ricks,* 449 U.S. 250, 258, 101 S.Ct. 498, 504, 66 L.Ed.2d 431 (1980) (distinguishing between discriminatory denial of tenure and the inevitable future loss of the docent's teaching position); *United Air Lines,*

> *Inc. v. Evans,* 431 U.S. 553, 557-58, 97 S.Ct. 185, 188-89, 52 L.Ed.2d 571 (1977) (distinguishing between a past discriminatory discharge and the present application of a non-discriminatory seniority policy which gives present effect to the past act).

Id., 912 F.2d at 523. *See also, Sabree v. United Brotherhood of Carpenters And Joiners,* 921 F.2d 396, 400 (1st Cir. 1990); *Lawton v. State Mut. Life Assur. Co. of America,* 924 F.Supp. 331, 340 (D.Mass.), *aff'd,* 101 F.3d 218 (1st Cir.1996).

It is noteworthy that during oral argument on Kodak's motion for summary judgment, Ms. Thomas' counsel expressly defended the theory of her case on the following basis:

> When that performance appraisal was given to the plaintiff, she had no information about how other people were treated in their performance appraisals. She had no idea that that document would, or how it ever could, be used as a consequence of her employment.[6] The discriminatory act was firing her. It was based ***upon the poison fruit*** that was put in place years before in '90, '91 and '92. The fact that the paper trail started more than 300 days before does not prevent her from using that paper trail.

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[6] This statement is puzzling in light of the district court's finding that performance appraisals were used to "reward each individual's job performance appropriately" *Thomas,* 18 F.Supp.2d at 131, and as noted by the First Circuit, for "determining who should be promoted, transferred, demoted, terminated, laid off and re-employed." *Thomas,* 138 F.3d at 54.

(App. 76a.) (Emphasis supplied and footnote added.) Thus, Ms. Thomas' "fruit of the poison tree" rationale has been expressly rejected by the First Circuit, and properly so because it runs afoul of *Jensen's* teaching that:

> It can ordinarily be assumed "that many facts will come to light after the date of an employee's termination, and indeed one purpose of a charge and a complaint is to initiate the process of uncovering them. What matters is whether, when and to what extent the plaintiff was on inquiry notice.
>
> . . . . .
>
> Employers as well as employees are entitled to procedural safeguards in the precincts patrolled by Title VII. . . . The Court has taught that "[p]rocedural requirements established by Congress for gaining access to the federal courts are not to be disregarded" even in sympathetic circumstances. *Baldwin County Welcome Center v. Brown,* 466 U.S. 147, 152, 104 S.Ct. 1723, 1726, 80 L.Ed.2d 196 (1984) (refusing to invoke equitable tolling in Title VII case). Here, the circumstances are not particularly sympathetic.

Id., 912 F.2d at 521-22.

Similarly, Ms. Thomas' case for avoiding the statute of limitations is equally unsympathetic. As noted by the district court, Ms. Thomas refused to sign two of the three PAs at issue. *Thomas,* 18 F.Supp.2d at 134, n.7. In her deposition, she testified that her reason for not signing the 1992 PA was

"I did not feel that I was being fairly evaluated." (App. at 97a). Furthermore, in her interrogatory responses, when asked to set forth all unlawful discriminatory acts that were committed against her, numerous pages of her responses are devoted to a recitation of her supervisor's transgressions, including failing to give her fair PA scores. App. at 113a-118a. Thus, contrary to the *Thomas* panel's statement that a "trier of fact could, but need not necessarily, conclude that Thomas had notice of the appraisals' possible bias,"[7] Ms. Thomas unequivocally states that she did believe that the PAs were tainted by racial animus when rendered. She therefore must be charged with actual knowledge of a potential Title VII claim, and at the very least, with "inquiry notice" as required by *Jensen.*

In irreconcilable contrast to the "inquiry notice" established by *Ricks* and affirmed in its own prior case law interpreting and applying decisions of this Court, the *Thomas* court reasoned that:

> The key is whether those evaluations had tangible, concrete effects at the time they were conducted. . . . If the evaluations did not have tangible, concrete effects at the time, no claim regarding discriminatory evaluations accrues. Under the notice standard, no claim will accrue until and unless the evaluations result in a tangible injury.

Id., 138 F.3d at 50.

> Kodak's argument pertains to notice of bias rather than notice of harm required under

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[7] *Thomas*, 183 F.3d at 50.

> *Johnson.* But notice of bias alone, absent harm, is clearly not sufficient under *Johnson*:

Id., 138 F.3d at 55.

Not only is the notion of inquiry notice abandoned, but the *Thomas* court ignores the fact that unlawful bias *itself* the very harm that Title VII seeks to remedy. To take the position that Title VII's remedial purposes are not brought into play until there are some "apparent consequences" or "crystallized implications" turns the statute on its head.[8] This Court has never given even "continuing violation" cases as much latitude as the First Circuit would give the accrual period, and employees can now take a "wait and see" approach that enables them to fare better than they could under that case law, which constituted for employees the most indulgent construction of Title VII's accrual date.

Furthermore, notwithstanding the First Circuit's concerns about "ripeness," (138 F.3d at 50), Ms. Thomas did have a Title VII cause of action for the PAs she believed were tainted by discriminatory animus. *See, Smith v. Sec'y of the Navy, supra; see also, Womack v. Shell Chemical,* 514 F.Supp. 1062, 1104-05 (S.D.Ala. 1981); *Ka Nam Kuan v. City of Chicago,* 563 F.Supp. 255 (N.D.Ill. 1983); *Woolery v. Brady,* 741 F.Supp. 667 (E.D.Mich. 1990). Under the notice rule formulated by the *Thomas* court, there is no meaningful distinction between an alleged discriminatory act and its ultimate consequences, and thus no time limit whatsoever is placed upon the accrual of a claim by an employee who believes discrimination has occurred. The notice rule enunciated by the First Circuit would require an employee to act only when, and if, she or he subjectively appreciated and per-

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[8] As Judge Cowen aptly noted in his dissenting opinion in *Colgan,* it is incongruous to believe that discriminatory employee evaluations do not constitute harm to an employee. *Colgan, supra,* 935 F.2d at 1426-27.

ceived the nature and degree of the precise future adverse consequences that could result from the alleged discrimination.[9] This is simply contrary both to existing law and to logic.

Thus, to consider the actual layoff, pursuant to an admittedly non-discriminatory process, as the date of the "unlawful employment practice" under § 2000e-5(e)(1) because it is somehow on a "derivative" basis exalts nomenclature over logic. The decisions of this Court and other courts of appeal consistently counsel against the reasoning of the *Thomas* court, and therefore the decision should be reversed.

II. THE NOTICE RULE FORMULATED BY THE FIRST CIRCUIT STRIPS AWAY ANY OF THE PROTECTIONS AFFORDED TO AN EMPLOYER UNDER THE CASE LAW THAT EMBRACES SUCH A RULE.

The notice rule formulated by the First Circuit improperly allows an employee to "reach back" for an indefinite period and utilize stale evaluations that would be time barred, but

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[9] Under the *Thomas* court's notice rule, an employee could wait for years before seeking a remedy for alleged discrimination. A review of the plaintiff's complaint (App. 77a) demonstrates that this is not merely an abstract possibility. The complaint alleged past violations of denial of promotion opportunities (¶ 14) and unequal pay (¶ 15) during her tenure at Kodak. Her demand for relief (¶ 23) seeks recovery for "including without rotation, her termination . . . lost wages, [and] loss of income due to denial of employment opportunities. . . ." Given the *Thomas* court's decision, the allegations of (¶¶ 14 and 15 are no longer merely background to her primary contention — subsequently abandoned — that the PAR process was a pretext, because layoffs in other departments were based upon seniority (¶¶ 19-21), but are now actionable, although clearly occurring well outside of the applicable limitations period.

does not afford an employer any protection of good faith reliance in the absence of any prior challenge by the employee. The First Circuit's notice rule was predicated upon *Stoller v. Marsh,* 682 F.2d 971 (D.C. Cir.1982), a case relied on by the *Johnson* court. As the First Circuit correctly notes, *Stoller* held that "a plaintiff could challenge an employer's wrongful reliance on discriminatory evaluations, even where the plaintiff has acknowledged that the employer's reliance itself was not intentionally discriminatory." *Thomas,* 183 F.3d at 52.

However, critical to Kodak is that *Stoller* also enunciated a rule that afforded some protection to employers with an established procedure affording an employee the opportunity to challenge allegedly inaccurate materials or discriminatory assessments of their performance:

> If established procedures have given an employee a reasonable opportunity to inspect the supervisory evaluations in his or her file, to challenge allegedly inaccurate materials, and to have such materials corrected or removed, and if the organization gives its employees adequate notice that these rights may be exercised, then it may rely in good faith on such evaluations in making subsequent employment decisions without violating Title VII.

Stoller, supra, 682 F.2d at 979 (footnotes omitted).

As established in the record, Kodak has an "Open Door" policy that allows any employee who feels mistreated for any reason to seek redress. (*Thomas*, 183 F.3d at 52.) However, Ms. Thomas ***never*** complained to her supervisors or to any Human Resources representative about any of the statements

or conduct she now alleges to be discriminatory by way of this action.[10]

The First Circuit stated that "[W]e can imagine advantages of the *Stoller* rule for both employers and employees" (*Thomas,* 183 F.3d at 52), but then rejects this part of *Stoller.* As a result, Kodak suffers the worst of both worlds: it receives no protection from its "Open Door" policy as a safeguard envisioned by *Stoller*[11] and is then saddled with the First Circuit's relaxed accrual standard for limitations purposes. Ms. Thomas gets to "have it both ways" because, notwithstanding her apparent belief of alleged racial bias at the time the PAs were rendered, she is not required to challenge them within the statutory period. She can wait until some consequential act in the future to be the "trigger event" for the accrual of the limitations period and file a suit that is deemed timely. Other courts have wisely failed to allow this. *See, e.g., Woolery v. Brady, supra,* 741 F.Supp. at 670 (discussing and apparently applying *Stoller* to bar a Title VII claim by an employee who failed to challenge his evalua-

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[10] *See*, Thomas Deposition; App. 82a-86a; 90a-92a; 94a-111a.

[11] In dismissing Kodak's argument that given the "Open Door" policy it is victimized by Ms. Thomas' ability to take a "wait and see" approach, the First Circuit interpreted Kodak's argument to seeking an analogue to an ERISA "exhaustion requirement" (183 F.3d at 50-52), but this is simply inaccurate. Kodak argued for application of the well-settled "inquiry notice" requirement as discussed in *Jensen. See also, Ricks,* 250 U.S. at 262 ("We recognize, of course, that the limitations periods should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes."). Given that as early as 1990, Ms. Thomas believed that racial animus had tainted her PA scores, she was on "inquiry notice" sufficient to require her to challenge her PA scores when they were rendered. However, because she chose to do nothing, then Kodak should have the protection established by *Stoller.*

tions, and was subsequently denied a promotion because of his rankings).

By adopting a notice rule based upon *Stoller v. Marsh* but jettisoning the "good faith" protection *Stoller* affords an employer with a mechanism such as Kodak's "Open Door" policy, the First Circuit has rendered Title VII's limitations period meaningless. An employee can contend that an evaluation rendered 10 or more years ago, that has later resulted in some other adverse consequence, is "concrete, tangible harm" constituting a present violation of Title VII. The statute's limitations period is vitiated, and employers have no protection against stale claims by employees who have consciously failed to pursue their rights.

III. EVEN IF THE *THOMAS* PANEL'S NOTICE RULE IS APPLIED, THE RECORD CONTAINS EVIDENCE THAT BARS MS. THOMAS' CLAIM.

A. The Notice Rule is Inherently Confusing and Subject to Misapplication, Because It Unsuccessfully Attempts to Distinguish Between the Consequences of Discrimination Eschewed by *Ricks*, and Instead Calls Them "Unrelated Harms."

As noted above, the record contains ample evidence that Ms. Thomas believed she suffered discrimination when she received her PAs from 1990-1992.[12] The First Circuit held

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[12] Ms. Thomas testified at her deposition that she refused to sign her 1990 PA, because she disagreed with "the entire performance appraisal," Appendix at 91a, and "did not feel that she was being fairly evaluated" in her 1992 PA (App. at 96a-97a.)

that this possible notice of bias is not dispositive because "[T]he key is whether those evaluations had tangible, concrete effects at the time they were conducted." *Thomas,* 183 F.3d at 50. However, even adopting this standard, Ms. Thomas' claim accrued in 1990 because in that same year she did *not* receive a salary increase.[13]

Thus, in applying its own standard, the First Circuit erred in finding that "[t]he appraisals did not specify that Thomas was to suffer an immediate consequence of her alleged performance failures. . . ." *Thomas,* 183 F.3d at 54; *See also, id.,* at 50, n.8: "If, for example, a poor job evaluation resulted in a denial of a salary increase, notice of the denial would mark the accrual point for a pay inequity claim." Therefore, on this basis alone, the decision should be reversed.

Moreover, this reasoning demonstrates that the notice rule adopted by the *Thomas* panel is simply unworkable, and capable of misapplication, because it improperly designates various possible consequences of unlawful discrimination as separate claims, and then attempts to classify them as "related" as opposed to "unrelated" harms:

> Under *Ricks,* we must also consider whether the appraisals led to any other concrete harm for which the layoffs were the "delayed but inevitable consequence." *Ricks,* 449 U.S. at 257-58, 101 S.Ct. 498. We do not find any evidence of such related harm in the record.
>
> As noted above, it is not clear whether a separate, unrelated harm would also trigger the ac-

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[13] Ms. Thomas confirmed this in her deposition testimony. *Id.* at 91a, 95a-96a.

> crual of Thomas's layoff claim. We need not reach this question. Assuming arguendo that unrelated harms would trigger accrual of Thomas's layoff claim, accrual was not triggered here, because Thomas's appraisals did not in fact result in any tangible, concrete harms at the time they were presented to her. Although Thomas was denied some promotion opportunities during Flannery's tenure, she was not told that she lost those opportunities because of her low performance appraisals; rather, Flannery told her she lacked the proper credentials. Thomas was also not told that her salary would be affected by her low scores, and indeed, it appears that her salary kept pace with the other five CSRs throughout Flannery's tenure as Customer Support Manager.

Thomas, 183 F.3d at 55, n.9.

First of all, the *Thomas* panel fails to note the evidence in the record based upon Ms. Thomas' sworn deposition testimony and interrogatory responses to the effect that she did believe the PAs were tainted by racial animus. In addition, the court apparently brushes aside Ms. Thomas' failure to obtain a salary increase in 1990. It implicitly accepts the notion that in the obverse of the instant case, if Ms. Thomas sued for an unlawful failure to afford her promotion opportunities, she would not have a cause of action because she was not ***told*** that her PA scores affected such opportunities. This flies in the face of the acknowledged purpose of the PAs, the reality of the modem workplace, and the established law under Title VII.

Furthermore, the *Thomas* court reads *Ricks* too narrowly as requiring that the consequence necessarily be "inevitable" in order for an employee to be required to take action. *Evans and Zipes,* decided respectively before and after *Ricks,* do not presuppose that "inevitability" of a consequence is determinative of the accrual of the limitations period. In both of those cases, the later "consequences" were not known nor capable of being known, and certainly not "inevitable." Thus, the *Thomas* court's attempt to designate Ms. Thomas' ultimate layoff as an "unrelated harm" is analytically unsound, because it presupposes that which *Ricks* squarely rejects — that an "unrelated harm" is but another incantation of the kind of "consequence," inevitable or otherwise, that denies a Title VII claimant another, later, accrual date. By denominating an "inevitable consequence" as an "unrelated harm," and classifying the latter as a separate claim allowing an employee to elect an accrual date years after being on "inquiry notice" of discrimination, the *Thomas* panel runs afoul of this Court's settled law, and creates confusion in an area of the law that needs clarity for all concerned — employers and employees alike.

CONCLUSION

For all of the above reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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January 4, 2000

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APPENDIX A

[38] 183 FEDERAL REPORTER, 3d SERIES
183 F.3d 38 (1st Cir. 1999)

Myrtle THOMAS, Plaintiff, Appellant,

v.

EASTMAN KODAK COMPANY,
Defendant, Appellee.

No. 98-2231.

United States Court of Appeals,
First Circuit.

Heard Nov. 3, 1998.

Decided July 15, 1999.

Former employee brought Title VII race discrimination action against former employer. The United States District Court for the District of Massachusetts, Arthur Garrity, Jr., J., 18 F.Supp.2d 129, granted former employer's motion for summary judgment. Former employee appealed. The Court of Appeals, Lynch, Circuit Judge, held that: (1) action accrued when employee received notice of layoff, not when she received negative performance appraisals; (2) once employee has shown employer's reason for adverse action is pretextual, employee is not always required to produce direct evidence to demonstrate that employer's real reason was discriminatory; (3) District Court erroneously based entry of summary judgment upon nondiscriminatory reason not articulated by employer; and (4) employee met burden of

showing employer's proffered reason for laying her off was pretext for race discrimination.

Reversed and remanded.

[42] Marisa A. Campagna, with whom the Law Offices of Marisa A. Campagna, Charles P. Wagner, and Silva & Wagner were on brief, for appellant.

Michael A. Fitzhugh, with whom Jon M. Nelson and Fitzhugh & Associates were on brief, for appellee.

Before Lynch, Circuit Judge, Bownes, Senior Circuit Judge, and Lipez, Circuit Judge.

LYNCH, Circuit Judge.

In 1993, Myrtle Thomas, the only black Customer Service Representative in Eastman Kodak's Wellesley, Massachusetts office, was laid off. Thomas responded with a race discrimination suit against Kodak under Title VII, 42 U.S.C. §§ 2000e to e-17, arguing that Kodak's layoff decision was discriminatory because it resulted from a ranking process that relied on racially biased performance appraisals prepared in 1990, 1991, and 1992. Kodak made two arguments in its motion for summary judgment: first, that Thomas's claim was time-barred because the performance appraisals were conducted outside of Title VII's statutory limitation period, and second, that Thomas failed in any event to present enough evidence of racial animus to support a disparate treatment claim. The district court disagreed with the first point but agreed with Kodak's second argument and granted summary judgment. Both issues are before us on appeal.

We hold that the date of the notice of the layoff is the date from which the limitations period ran. Because the evaluations caused no concrete harm until the layoff, we reject the employer's argument that, instead of the layoff date, the date of the evaluations should be used as the start of the limitations period. Because we also find that she has presented enough evidence to support her claim that the performance appraisals were racially biased, we reverse the district court's grant of summary judgment and remand for further proceedings.

After thirty-five years of litigation under Title VII, cases can still present new wrinkles. This is one such case. Because it raises a number of important issues—some new and some familiar but difficult—we preview the key holdings.

[1] First, when an employee claims that a layoff is discriminatory and the employer utilizes scores from past performance appraisals in an objective formula to determine who will be laid off, the limitations period runs from the date of the notice of layoff where the laid off employee has suffered no concrete earlier harm from the appraisals.

Second, once there is sufficient evidence to create a material issue of fact that the employer's articulated reason for an adverse employment action is a pretext, there is no requirement that a plaintiff always produce direct evidence to demonstrate that the real reason was discriminatory.

Third, Title VII's prohibition against "disparate treatment because of race" extends both to employer acts based on conscious racial animus and to employer decisions that are based on stereotyped thinking or other forms of less conscious bias.

Fourth, under the *McDonnell Douglas/Burdine* framework, a court may not enter summary judgment for an employer based upon a non-discriminatory reason not articulated by the employer but identified sua sponte by the district court.

I

In reviewing a grant of summary judgment, we consider the facts in the light most favorable to the nonmoving party, drawing all reasonable inferences in that party's favor. *See Aponte Matos v. Toledo Davila*, 135 F.3d 182, 186 (1st Cir. 1998). Given the subtlety of the questions before **[43]** us, we outline Thomas's experiences at Kodak in some detail.

Thomas was a long-term Kodak employee. She first began working for the company in 1974. In 1980, after working for six years in clerical and administrative positions in Kodak's Rochester, New York facility, she was promoted to Customer Support Representative ("CSR") within the Office Imaging Division and transferred to Kodak's office in Wellesley, Massachusetts.

Along with five other CSRs working out of the Wellesley office, Thomas supported customers in an assigned territory who owned Kodak copiers and other Kodak equipment. She helped salespeople perform installations, trained customers in the use and maintenance of Kodak equipment, facilitated communication between customers and sales and service personnel, and provided other forms of marketing support.

Thomas generally performed her job well. Kodak managers who supervised Thomas during her first ten years as a CSR in the Wellesley office reported variously that they

were never dissatisfied with her performance, that they were "delighted" with Thomas, that her work was "excellent" and "far superior" to that of some of the other CSRs, that she was "very much on top of things," and that she was "the perfect support person."

Co-workers and customers expressed similar sentiments. A sales representative who worked with Thomas sent a memorandum to Thomas's supervisor praising her "continuous professionalism," "very high level of commitment," and "total dedication." The sales representative later noted that he was particularly impressed with the way a certain customer "really went out of his way" to emphasize his satisfaction with Thomas's support. Another customer who contacted Kodak after Thomas's layoff described Thomas as "an irreplaceable part of the Kodak team" and explained that Thomas was the primary reason for his selection of Kodak copiers over copiers from other companies. The customer concluded: "In my many contacts with company representatives, I have not met anyone of the class and caliber of Myrtle Thomas."

Because of her high level of performance, Thomas received awards and bonuses from Kodak. In 1989, the company also changed Thomas's grade from K4 to K6, which resulted in a salary increase. According to Kodak's job description, the K6 grade was limited to CSRs who were "making an outstanding contribution to the support activities," defined as "servicing the largest and/or most sensitive accounts, developing and giving individualized presentations and/or demonstrations, and training new CSRs." Thomas received at least eight other salary increases during her years as a CSR. At the time of the 1993 layoff, Thomas was the

fourth most senior CSR in the Wellesley office and earned the third highest salary.

The Kodak compensation plan stated that "[t]he company's goal for [its] pay program is to reward each individual's job performance appropriately" and to ensure that "[p]eople with higher performance will, over time, be paid more than average performers." The company made use of annual performance appraisals in order to reach this goal. According to the compensation plan, performance appraisals were also used for a number of other purposes, including:

> A. Evaluating and documenting the performance of each individual in comparison with performance expectations for the job.
>
> B. Providing individuals with constructive feedback.
>
> C. Identifying the guidance and training that can help individuals be as successful as their ability permits.
>
> [and]
>
> D. Determining who should be promoted, transferred, demoted, terminated, laid off, and re-employed.

[44] To conduct an appraisal, the supervisor who directed an employee's day-to-day activities filled out an appraisal form. The form contained a section pertaining to "basic performance measures," which included categories for quality of results, quantity of results, job skills, and teamwork. Another section pertained to "additional performance meas-

ures," including dependability, versatility, communications, and leadership. The form required the supervisor to give the employee a rating from 1 to 7 for each applicable category, as well as an overall rating.[1] A separate section of the appraisal form contained space for the supervisor's comments on the evaluated categories, a description of any developmental opportunities, a description of matters discussed during the post-appraisal interview with the employee, and both supervisor and employee signatures. Each appraisal was also reviewed and signed by the appraiser's supervisor. The appraiser and the appraiser's supervisor were together responsible for the appraisal's accuracy, consistency, and conformance to company policy, including a policy favoring fair and objective evaluations, conducted "without regard to non-job-related criteria such as[] race."

Kodak intended the appraisal scores to be on a curve, company-wide. The compensation plan suggested that "performance appraisal ratings for large groups of people (approximately 100 or more) [should] average around the middle of the rating scale," but acknowledged that factors such as the amount of turnover and the percentage of long-term employees could influence the distribution of ratings in any given group, particularly groups with a small number of employees. The compensation plan suggested that appraisers attempt to validate their distribution of appraisal ratings by rank-ordering employees in the same grade and job category. After the rank ordering was complete, supervisors would fi-

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[1] The lowest rating was 1 (for performance that "does not meet essential job requirements") and the highest was 7 (for performance that "far exceeds requirements of the position"). The middle rating of 4 was considered appropriate "for individuals who regularly perform all assigned responsibilities with independence and initiative, and achieve expected results on a continual basis."

nalize the preliminary ratings to agree with the rank-order results. However, these rank orderings were not discussed with employees. Supervisors were told that "[a]ppraisals verified through this process [should be] communicated by referencing performance relative to job expectations with no reference to the rank-order process."

Thomas's appraisals for 1988 and 1989 show that she was performing at a high level. In 1988, when she was responsible for more than 400 machines, Thomas received seven 5 ratings and one 6 rating, for an overall rating of 5, which was a rating "appropriate for individuals who not only achieve results and meet all expectations on a regular basis, but who go beyond these requirements from time to time." Her supervisor's comments were uniformly positive. In 1989, when she was responsible for more than 500 machines, Thomas received even higher ratings—five 6s and three 5s, for an overall rating of 6, which meant that her "[p]erformance consistently exceed[ed] the requirements of the position and [was] characterized by unusual initiative, resourcefulness, and creativity." Once again, the supervisor's comments were uniformly positive.

In 1989, Kodak created the position of Customer Support Manager throughout its Office Imaging organization. Thomas asked to be considered for the Wellesley position, but was told that she was not qualified. Instead, the position went to Claire Flannery, a former CSR who had been working as a division secretary. As Customer Support Manager, Flannery was responsible for supervising the six Wellesley CSRs. She remained in this position until 1993, when both she and Thomas **[45]** were laid off as part of a company-wide reduction in force.

The appointment of Flannery as Customer Support Manager marked a significant downturn in Thomas's fortunes at Kodak. Although Thomas states that she and Flannery "were on a professional basis," and Flannery denies having any problems with Thomas's job performance, it appears that their working relationship was strained. Thomas alleges that Flannery treated her differently from the other five CSRs, all of whom were white[2] (as were, in fact, all of the other CSRs during Thomas's thirteen years in the Wellesley office).

She describes a number of occasions on which she claims Flannery unnecessarily damaged her professional standing with customers. For example, on the only occasion on which Flannery accompanied Thomas to a customer training session in order to observe Thomas's work, Flannery instead took over the session and conducted the entire training herself. On another occasion, Flannery told Thomas the wrong time for a training session Flannery had scheduled on site, and then refused to write to the customer, who was upset, to explain why Thomas had been several hours late. (After Thomas proved to Flannery what had occurred by playing back Flannery's voice mail message to her, Flannery did agree to call—but not to write—the customer.) On a third occasion, Flannery became quite angry and attempted physically to block Thomas from leaving a CSR meeting which had been scheduled at the same time as an important training session for one of Thomas's customers.

Thomas also provides evidence from which the inference can be drawn that Flannery did not evaluate her skills fairly or give her appropriate opportunities for growth and success. For example, Flannery did not travel with Thomas as she did

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[2] We use the terms "black" and "white," as Thomas has chosen this terminology.

with the other CSRs in order to observe Thomas's interactions with customers. Flannery did not give Thomas the same type of developmental opportunities available to other CSRs. She criticized Thomas for lack of computer skills, but then failed to train Thomas when computer equipment became available. After Thomas was asked to prepare a presentation for a Kodak meeting, Flannery told her that there would not be time for her presentation, although time was found for a presentation by a white employee on a less pressing topic. Thomas was denied the opportunity to apply for sales jobs, despite her good track record in sales support activities. Flannery expressly discouraged her from applying for a management position in another division, telling her she was not qualified because she did not yet have a master's degree (Thomas was studying for one at the time), even though none of the other managers in that position had a master's degree or even a bachelor's degree. Finally, Flannery went to great lengths to prevent Thomas from meeting with Bill Cassidy, the Regional Vice President for Office Imaging, to discuss advancement opportunities, and became angry when Thomas nevertheless managed to schedule an appointment.

Thomas's most significant and concrete allegation is that Flannery gave her inaccurately low scores on her annual performance appraisals. For example, after receiving only 5s and 6s in 1988 and 1989, Thomas received a 2, four 3s, and a 4 from Flannery in 1990, for an overall score of 3. This was a below-average rating, appropriate for employees who had "a need for further improvement to achieve a middle rating [of 4]" or for employees "whose overall performance has slipped from a higher level." Thomas's performance appraisal scores in 1991 and 1992, while higher than her 1990 scores, were also inappropriately low, in Thomas's estima-

tion—especially when compared to the higher scores that Flannery gave to other [46] CSRs. Thomas presents specific comparisons, discussed further below.

Thomas was distressed by the 1990 performance appraisal and refused to sign it. She also refused to sign the 1992 appraisal, and signed her 1991 appraisal only "'out of a joke,' because it was a joke." It is clear that Thomas disagreed with Flannery's evaluations; more than that—she found them "insulting" and "shameful." To the extent that it was possible for her to compare salary and raises with other CSRs, however, she would not have noted any obvious effects of the negative appraisals, since neither her salary nor the raises she was given during Flannery's tenure as Customer Support Manager differed significantly from those of other employees. She did complain about the appraisals, both to Flannery herself and to others within Kodak, including Bill Cassidy, the Regional Vice President for Office Imaging, and Patti Weissinger, a Human Resources Representative. However, fearing retaliation from her new boss, she did not file a formal charge against Flannery with the Human Resources Department, and Kodak did not take any action in response to her informal complaints.

In January 1993, Kodak decided to reduce the number of employees in its Office Imaging Division. It selected employees for layoff using a "Performance Appraisal Ranking Process ("PAR process"), which produced a numerical score for each employee by adding together the employee's overall performance appraisal score for each of the three preceding years, after weighting the most recent score by a factor of 25 and the second most recent score by a factor of 5.[3] Thomas's

[3] This formula was used for employees whose grade remained the same for all three years. If an employee had changed grades during the

PAR ranking, which was derived from the three appraisals conducted by Flannery, was the second lowest of the Wellesley CSRs. Since Kodak had decided to cut two Wellesley CSR positions, as well as the Customer Support Manager position, Flannery, Thomas, and the lowest ranked CSR (Eileen Lavallee) were laid off in March 1993.

II

In July 1993, four months after her layoff, Thomas filed a charge of race discrimination with the Equal Employment Opportunity Commission. The EEOC issued a "right to sue" letter in February 1996, and Thomas brought suit in May 1996.

Although her complaint asserts a variety of race discrimination claims, Thomas has focused primarily on Kodak's 1993 decision to terminate her, arguing that this decision was discriminatory because it was based on discriminatory performance appraisals conducted by Flannery from 1990 through 1992.[4] It is the layoff which is the subject [47] of this appeal. Kodak moved for summary

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three year period, the formula gave less weight to the score immediately following the grade change.

[4] Thomas described a number of other events as evidence of unlawful race discrimination by Kodak. The district court provided a succinct summary:

> When plaintiff was transferred to Wellesley, Kodak did not fly her to Massachusetts, as it had other transferred employees. Instead, Thomas was told to drive a car that had been requested by Richard Austin, her new supervisor. The car was in disrepair, requiring a new muffler. Though other employees had two weeks in a new location before reporting to work, plaintiff was told to report right away. As part of plaintiff's move benefits,

this appeal. Kodak moved for summary judgment, contending that Thomas's claim was time-barred, and in the alternative, that she had failed to present enough evidence of racial animus to reach a jury under the First Circuit's standard for showing disparate treatment once pretext has been shown. *See Udo v. Tomes*, 54 F.3d 9, 12-13 (1st Cir.1995) (describing standard). The district court found Thomas's claim timely, but granted summary judgment to Kodak on the merits argument. *See Thomas v. Kodak*, 18 F.Supp.2d 129, 133-38 (D.Mass.1998). On appeal, Thomas argues that the district court applied the standard incorrectly. Kodak defends the district court's application of the standard, while also continuing to argue that Thomas's claim is time-barred.

Kodak provided storage for her belongings. The warehouse burned in 1981, destroying virtually all of Thomas' belongings. Thomas gave Austin an inventory of her losses; in response, he asked, "Are you rich or something?" Before Thomas was reimbursed, another Kodak employee encouraged her to change her inventory listing. Defendant did not reimburse Thomas for five years. A few months after Thomas began working in Wellesley, she was standing with a group of employees when Austin introduced two visiting sales managers. Austin introduced everyone in the group except Thomas. In 1983, Thomas passed a co-worker in the hallway outside the department manager's office. The co-worker asked the manager if plaintiff was "here to do the cleaning." Thomas lost a gold bracelet at work. A co-worker announced finding it just before a sales meeting, as other employees arrived. Thomas claimed the bracelet, and described it at his request. He refused to return the bracelet until he had confirmed that it did not belong to another, white female employee.

Thomas v. Eastman Kodak Co., 18 F.Supp.2d 129, 132 (D.Mass.1998).

III

We review the district court's grant of summary judgment de novo, *see Lennon v. Rubin*, 166 F.3d 6, 8 (1999), and will find summary judgment appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law," Fed. R. Civ. P. 56(c).

A

[2, 3] We first address Kodak's argument that the district court erred in not dismissing the action as untimely. Title VII requires aggrieved individuals to file a charge with the EEOC "within one hundred and eighty days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1). In a "deferral jurisdiction," such as Massachusetts, this period is extended to three hundred days.[5] *See*

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[5] The full story is more complicated, in part because § 2000e-5(e) interacts with § 2000e-5(c), which imposes a sixty-day waiting period between the filing of a charge with state or local authorities and the filing of a charge with the EEOC:

> [A] complainant in a deferral State . . . need only file his charge within 240 days of the alleged discriminatory employment practice in order to insure that his federal rights will be preserved. If a complainant files later than that (but not more than 300 days after the practice complained of), his right to seek relief under Title VII will nonetheless be preserved if the State happens to complete its consideration of the charge prior to the 300-day period.

42 U.S.C. § 2000e-5(e)(1); *Mohasco Corp. v. Silver*, 447 U.S. 807, 814 n.16, 100 S.Ct. 2486, 65 L.Ed.2d 532 (1980); *Mack v. Great Atl. & Pac. Tea Co.*, 871 F.2d 179, 181-82 (1st Cir.1989). This relatively short limitations period serves important interests. "The limitations period[], while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect[s] employers from the burden of defending claims arising from employment decisions that are long past." *Delaware State College v. Ricks*, 449 U.S. 250, 256-57, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980). In the Title VII context, as in others, "the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Id.* at 259-60, 101 S.Ct. 498 (internal quotation marks omitted) (quoting *Johnson v. Railway Express Agency, Inc.*, 421 U.S. **(48)** 454, 463-64, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975)). Congress has made that value judgment.

[4] However, Title VII's statute of limitations is not self-executing. The three hundred day (or one hundred and eighty day) rule cannot be mechanically applied, because it is not possible to pinpoint when the limitations period begins—i.e., when the plaintiff's claim "accrues"—without first determining the date, or the temporal boundary, of the "alleged unlawful employment practice" referred to in § 2000e-5(e)(1).

Mohasco Corp. v. Silver, 447 U.S. 807, 814 n.16, 100 S.Ct. 2486, 65 L.Ed.2d 532 (1980). None of these subtleties is relevant to the question here, since, as the district court noted, "[p]laintiff filed her EEOC charge within the minimum 180 days of her termination, but more than the maximum 300 days after her most recent evaluation." *Thomas*, 18 F.Supp.2d at 133 n.1.

The crux of Thomas's claim is that her layoff is tainted because the 1990-92 performance appraisals were tainted by Flannery's alleged racial bias. Thomas does not argue that Kodak's decision to utilize the PAR process to determine who would be laid off was racially biased. *See Thomas*, 18 F.Supp.2d at 135 ("[P]laintiff does not contend that Kodak's . . . PAR layoff process[] [was itself] discriminatory."). As we understand her argument, she does not allege that Flannery and other Kodak employees participated in a conspiracy to oust her from her job because of her race, using the performance appraisals and the PAR process as a thin cover for this express discriminatory purpose. Rather, she argues that the PAR process was illegitimate under Title VII in a derivative way, because its calculations were based on discriminatory appraisal scores. If racially biased scores were plugged in to the PAR formula, she argues, then the ranking that came out must also be biased.

According to Kodak, this argument can only mean that the performance appraisals themselves constitute the "unlawful employment practice" at issue under § 2000e-5(e)(1), and thus that any claim regarding the allegedly biased performance appraisals must have accrued at the time the appraisals were conducted. Since even the most recent appraisal (presented to Thomas in May 1992) was conducted more than three hundred days before Thomas filed her complaint with the EEOC in July 1993, Kodak asserts that Thomas is precluded from questioning the racial neutrality of any of the three performance appraisals. And without the ability to challenge the appraisals upon which the PAR process was based, Kodak notes, Thomas's discriminatory termination claim collapses.

According to Thomas, the fact that the performance appraisals were conducted more than three hundred days before she filed her EEOC charge is irrelevant, because the adverse employment decision that she is challenging—the "unlawful employment practice" under § 2000e-5(e)(1)—is Kodak's decision to lay her off, and not the performance appraisals independently, and this decision indisputably fell within the statutory period.

Kodak's general policy stance makes sense: given that the central purpose of the statute of limitations is to protect employers from stale claims, it cannot be true that plaintiffs have an unfettered ability to reach back and litigate biased evaluations. Yet Thomas's position is also reasonable, since it seems unlikely that Title VII permits employers to take a new employment action such as a layoff which first causes an employee harm, as long as the allegedly discriminatory evaluations on which the layoff is based were conducted more than three hundred days earlier.

[5] Counsel did not call the court's attention to any First Circuit caselaw on this point. The district court, led to believe that the First Circuit had not addressed this question, "look[ed] for guidance elsewhere." *Thomas*, 18 F.Supp.2d at 133. The court focused on the decision of the Third Circuit in *Colgan v. Fisher Scientific Co.*, 935 F.2d 1407 (3d Cir.), *cert. denied*, 502 U.S. 941, 112 S.Ct. 379, 116 L.Ed.2d 330 (1991). The facts in *Colgan* do closely resemble the facts here. Like Thomas, the *Colgan* plaintiff was fired after receiving a negative performance re- **[48]** view. *See id.* at 1410-11. He filed a charge of age discrimination with the EEOC within three hundred days of his termination, but more than three hundred days after the negative performance review. *See id.* at 1411. The Third Circuit determined that

Colgan's claim was not time-barred because it accrued at *Colgan's* termination, not when he received the negative review. *See id.* at 1415-21. The court concluded that "an alleged unlawful employment practice, here the performance evaluation, must have inflicted harm which was or should have been noticed, or it will not have triggered the limitations period." *Id.* at 1418. *Colgan's* review stated that he failed to meet job requirements and expressly warned that action would be taken unless his performance improved. *See id.* at 1410. Nonetheless, the court found that the review did not produce the requisite notice of harm to trigger the running of the statute of limitations, because "[t]he performance evaluation had no immediate consequence on *Colgan's* employment, such as a loss of seniority, nor did it alert *Colgan* to the possibility that consequences would flow from it without an opportunity for him to improve his performance." *Id.* at 1419-20.The Third Circuit based its *Colgan* analysis on a trilogy of Supreme Court cases, which we summarize briefly here. In *United Air Lines v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977), the Supreme Court held that a flight attendant who was wrongfully forced to resign and then later rehired could not challenge the airline's refusal to grant her seniority as if there had been no break in her employment, since the relevant wrongful act—Evans's being forced to resign—occurred outside of the limitations period. *See id.* at 555, 97 S.Ct. 1885. In *Ricks*, the Court held that the college's denial of tenure, not a later discharge pursuant to that denial, was the event that triggered Title VII's statute of limitations. *See Ricks*, 449 U.S. at 156-58, 101 S.Ct. 498. Finally, in *Lorance v. AT&T Technologies*, 490 U.S. 900, 109 S.Ct. 2261, 104 L.Ed.2d 961 (1989), the Court held that the Title VII limitations period begins to run when an em-

ployer adopts a seniority system, not when an employee is demoted pursuant to that system.[6] *See id.* at 912-13. Read together, this trilogy defines a notice rule: an employer action only triggers the running of the statute of limitations if that action has concrete, negative consequences for an employee, and the employee is aware or should have been aware of those consequences. *See Colgan*, 935 F.2d at 1415-21; *see also* 2 B. Lindemann & P. Grossman, *Employment Discrimination Law* 1349 (3d ed. 1996) (observing that Supreme Court cases "seem to establish a relatively simple 'notice' rule as to when discrimination 'occurs'").

[6] We think many aspects of *Colgan's* reasoning are correct. However, we find more direct guidance in a First Circuit case decided several years before *Colgan*. In *Johnson v. General Electric*, 840 F.2d 132 (1st Cir.1988), a black employee claimed that he had been denied a promotion based on a special review process that was intentionally designed to prevent him from qualifying for promotion. *See id.* at 134. The employer contended that the plaintiff's claim accrued when the review process was first put into place, while the plaintiff insisted that the clock did not start running on his claim until he was informed that he had failed the review process and would not be promoted. *See id.* The district court, relying on *Ricks*, held that the establishment of the re-

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[6] Section 112 of the 1991 Civil Rights Act later overruled *Lorance*, allowing employees to challenge a seniority system "when the system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system." 1991 Civil Rights Act, Pub. L. No. 102-166, § 112, 105 Stat. 1071, 1079 (1991) (codified at 42 U.S.C. § 2000e-5(e)(2)). This may mean that seniority systems should be treated as an exception to the "notice rule" discussed in *Colgan*; alternatively, it may simply mean that Congress thought that the Court had misapplied the notice rule in the seniority system context.

view process was the "unlawful employment practice" of which the plaintiff complained, and therefore started the running of the statute from that point. *See id.* Although [50] this court affirmed the dismissal on other grounds, it disagreed with the district court's analysis, noting that the "question [is] . . . whether a claim accrues when an employee is made subject to an . . . evaluation . . . , or when that . . . evaluation is applied to deny the plaintiff particular benefits or positions." *Id.* This court chose the latter rule, holding that the notice standard is met and the statute of limitations is triggered only if "the implications [of the evaluation] have crystallized" and "some tangible effects of the discrimination were apparent to the plaintiff," i.e., if "the plaintiff is aware that he will in fact be injured by the challenged practice."[7] *Id.* at 136-37.

The decision was motivated, in part, by concerns about ripeness. The court noted that "it is far from clear whether claims under Title VII and analogous statutes would be ripe for adjudication until discriminatory systems [or evaluations] were actually applied to plaintiffs in particular employment decisions," and observed that "[i]t is unwise to encourage lawsuits before the injuries resulting from the violations are delineated, or before it is even certain that injuries will occur at all." *Id.* at 136.

Johnson's notice standard serves multiple functions. By starting the limitations clock as soon as harm is noticed, or should be noticed, the standard protects employers from stale

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[7] *Johnson*, which was decided shortly before the Supreme Court's decision in *Lorance*, suggested that this rule would apply to discriminatory seniority systems as well. *See Johnson*, 840 F.2d at 134. Congress has since provided a specific accrual rule for seniority systems. *See* 1991 Civil Rights Act § 112 (codified at 42 U.S.C. § 2000e-5(e)(2)).

claims while also lessening the risk that employees will bring unripe claims. The notice standard protects employees as well, because it ensures that claims will not be foreclosed by events that occurred outside the limitations period that did not put the employees on notice.

[7-9] The notice standard in *Johnson* also resolves the apparent contradiction between the two reasonable policy stances pressed by the litigants here. Thomas is correct that Title VII extends to a neutral employer decision-making process that relies on discriminatory evaluations. But Kodak is also right that employees do not have an unfettered right to reach back to challenge previous evaluations. The key is whether those evaluations had tangible, concrete effects at the time they were conducted. If the evaluation did cause tangible, concrete harm, the notice standard requires the injured employee to promptly bring suit to recover for those harms. Failure to do so will render any later claim regarding those particular harms time-barred.[8]

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[8] If, for example, a poor job evaluation resulted in a denial of a salary increase, notice of the denial would mark the accrual point for a pay inequity claim. Under *Ricks*, the statute would also begin to run on any other harm that was the "delayed, but inevitable, consequence" of the denial of a salary increase, *Ricks*, 449 U.S. at 257-58, 101 S.Ct. 498, since "[t]he proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful," *Ricks*, 449 U.S. at 258, 101 S.Ct. 498 (internal quotation marks and emphasis omitted) (alteration in original) (quoting *Abramson v. University of Hawaii*, 594 F.2d 202, 209 (9th Cir.1979)). *Ricks* did not address the question whether the statute of limitations would also begin to run on an unrelated harm (unrelated, that is, to the denial of a salary increase) which might later arise from the challenged employer act—for example, whether a plaintiff's challenge to a layoff decision based on the poor evaluation could be time-barred because the evaluation initially resulted

This means that an employer could be exposed to Title VII liability for harms stemming from discriminatory evaluations [51] some years after the evaluations were conducted, if the evaluations first cause tangible harm to the employee at that later point. Kodak argues that this puts employers in an untenable position. We disagree, for three reasons.

First, as a matter of practicality, employers are unlikely to rely on "stale" evaluations. The older the evaluation, the less likely an employer would be to use that evaluation as the basis of an employment decision. Employers' preference for more recent evaluations is demonstrated dramatically by Kodak's own PAR formula, which used only the latest three evaluations and then weighted the most recent by a factor of 25.

Second, the passage of time would affect employees as well as employers. An employee who sought to challenge an old evaluation would bear the burden of proving that the evaluation was discriminatory—and the older the evaluation, the more difficult that task would be.

[10] Third, the standard gives concomitant advantages to employers. It avoids forcing employees to "run to the EEOC" each time they disagree with a performance evaluation. As the district court aptly observed:

> If we apply the time bar to plaintiff's [performance appraisals], then we require a given plaintiff to file EEOC charges successively for each performance evaluation, informal feedback from a supervisor, or office rumor, so long as these events—even if non-

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in the denial of a pay increase. As we explain below, the facts here do not require us to resolve this difficult question.

> harmful in themselves—might be informed by racial animus and could someday contribute to a later, harmful result. This requirement would surely disrupt the American workplace . . . .

Thomas, 18 F.Supp.2d at 134-35. Instead, the *Johnson* notice standard allows employees to give employers the benefit of the doubt, where employees suspect that an evaluation which has yet to cause tangible harm might be tainted by bias, and encourages them to try to solve the problem by proving their actual worth to the employer. And while the standard places an ongoing obligation on employers to monitor their evaluation processes to ensure that they are free from illegal bias, employers also benefit from the opportunity to base personnel decisions on accurate, bias-free evaluations. In any event, this sort of obligation is foreseen by Title VII, since the statute encourages the elimination of both obvious and subtle forms of discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

In arguing against the application of the *Colgan* rule (which, as explained above, resembles the First Circuit standard announced in *Johnson*), Kodak has presented a two-stranded argument. The first strand is based on notions of fair notice to the employer. The second asserts that Thomas's timeliness argument relies on an impermissible combination of the equitable tolling and continuing violation doctrines.

Kodak would substitute for the accrual rule in *Johnson* a rule that focuses on notice to the employer. According to Kodak, the *Colgan* accrual rule makes "bad law because it allows an employee to introduce a time-barred incident where the employee has never previously contended, even in

an informal process afforded by the employer, that the employee was subjected to unlawful discrimination." Appellee's Brief at 17. According to Kodak, this violates "the policy underlying Title VII [entitling] an employer . . . to some kind of prior notice." *Id.*

This is not an irrational position, but Kodak cites no authority for it. The argument calls to mind the exhaustion rule imposed by courts in the ERISA context, *see* Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 et seq., which requires employees to take full advantage of employer-internal appeals processes before bringing suit to recover denied benefits, *see McMahon v. Digital Equipment Corp.*, 162 F.3d 28, 40 (1st Cir.1998) (noting court-imposed exhaustion rule for [52] ERISA benefit claims). But the analogy is inappropriate. ERISA requires employers to offer employees a speedy appeals procedure for denied benefits. *See* 29 U.S.C. § 1133 (stating that employers must "afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim"); 29 C.F.R. § 2560.503-1 (imposing time limits). Only after this process is complete does the ERISA statute of limitations begin to run. *See, e.g., Godfrey v. BellSouth Telecomms., Inc.*, 89 F.3d 755, 759-60 (11th Cir.1996); *Martin v. Construction Laborer's Pension Trust*, 947 F.2d 1381, 1385 (9th Cir.1991).

[11] In Title VII, by contrast, Congress chose not to impose a particular employer-internal appeals procedure. Furthermore, the statute of limitations for a Title VII claim is not tolled while an employee exhausts any internal remedy the employer has made available. *See Ricks*, 449 U.S. at 261, 101 S.Ct. 498 ("[T]he pendency of a grievance, or some

other method of collateral review of an employment decision, does not toll the running of the limitations periods."); *International Union of Elec. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 236-37, 97 S.Ct. 441, 50 L.Ed.2d 427 (1976) (holding that the Title VII statute of limitations is not tolled by a collective-bargaining grievance procedure). Thus, a court-imposed exhaustion requirement would not work well in the Title VII context, because it would place employees in the position of having to exhaust an internal appeals process of uncertain length while also bringing suit within three hundred (or one hundred and eighty) days of the employer's allegedly wrongful act.

Kodak's position bears an even closer resemblance to one aspect of the approach first explicated in *Stoller v. Marsh*, 682 F.2d 971 (D.C.Cir.1982), and followed by a number of other courts, *see, e.g., Hale v. Marsh*, 808 F.2d 616, 620 (7th Cir.1986); *Brown v. City of New York*, 869 F.Supp. 158, 169 (S.D.N.Y.1994); *Woolery v. Brady*, 741 F.Supp. 667, 669-70 (E.D.Mich.1990). The *Stoller* court held that a plaintiff could challenge an employer's wrongful reliance on discriminatory evaluations, even where the plaintiff has acknowledged that the employer's reliance itself was not intentionally discriminatory. *See Stoller*, 682 F.2d at 979 ("Otherwise an organization could separate illegal motive from decisionmaking responsibility, contrary to the principle that Title VII applies to the employer as an organization."). This is essentially the same result that *Johnson* permits. *See Johnson*, 840 F.2d at 135, 137 (citing this portion of *Stoller*).

But the *Stoller* court added a second part to this rule:

> [A]fter preparation of employee evaluations, the employing organization may protect itself from Title VII

> liability by establishing procedures to allow employees to screen their personnel files and to remove damaging, discriminatory information. . . . If established procedures have given an employee a reasonable opportunity to inspect the supervisory evaluations in his or her file, to challenge allegedly inaccurate materials, and to have such materials corrected or removed, and if the organization gives its employees adequate notice that these rights may be exercised, then it may rely in good faith on such evaluations in making subsequent employment decisions without violating Title VII.

Stoller, 682 F.2d at 979 (footnotes omitted). Kodak's "notice to the employer" argument could refer to this second half of the *Stoller* rule: Kodak apparently wants to be able to rely on Thomas's performance appraisals, because in its view Thomas had a reasonable opportunity to inspect the appraisals and to challenge inaccuracies through the "Open Door" appeals process.

We can imagine advantages of the *Stoller* rule for both employers and employees. Employers, of course, would be able to limit their liability. Employees could con- **[53]** ceivably benefit as well, if the rule increased the likelihood that employers would implement effective review procedures. But we decline to adopt this rule—which was, in any event, implicitly rejected in *Johnson*—because we think any possible advantages would be outweighed by two serious risks. One is the obvious risk that employers would have carte blanche to rely on discriminatory appraisals as long as they offered their employees an "Open Door." Avoiding the first risk would entail a second: courts would need to interpret strictly the concept of "[adequate] procedures to allow em-

ployees to screen their personnel files and remove damaging, discriminatory information." This would in turn entail a degree of judicial scrutiny and interference with day-to-day employer operations that employers would be unlikely to welcome and which courts interpreting Title VII have tried to avoid. *See Hidalgo v. Overseas Condado Ins. Agencies, Inc.*, 120 F.3d 328, 337 (1st Cir.1997) (noting courts' reluctance to "'sit as super personnel departments'" (quoting *Mesnick v. General Elec. Co.*, 950 F.2d 816, 825 (1st Cir. 1991))).

The second strand of Kodak's timeliness argument is the claim that both Thomas and the district court have relied on an illegitimate "hybrid" of the equitable tolling and continuing violation doctrines. Thomas disavows any such reliance. We make several observations in response to Kodak's argument.

[12] First, the First Circuit doctrine of equitable tolling is simply inapplicable to these facts. Some courts permit tolling of the statute of limitations if the plaintiff knew of a harm but not of its discriminatory basis. *See* 2 Lindemann & Grossman, *supra*, at 1350. But our approach to equitable tolling is narrower; First Circuit law permits equitable tolling only where the employer has actively misled the employee. *See Mack*, 871 F.2d at 185 (noting that the First Circuit's "narrow view" of equitable tolling reaches only "active deception" (internal quotation marks and citations omitted)); *Jensen v. Frank*, 912 F.2d 517, 521 (1st Cir.1990). There is no allegation here that Kodak actively attempted to mislead Thomas about her performance appraisals.

Second, there is no need to apply the continuing violation doctrine. Commentators have labeled this doctrine "the most

muddled area in all of employment discrimination law," 2 Lindemann & Grossman, *supra*, at 1351, and some courts have gone so far as to conclude that the entire doctrine is misguided and unnecessary, *see, e.g., Moskowitz v. Trustees of Purdue Univ.*, 5 F.3d 279, 282 (7th Cir.1993). We need not enter into that debate here. We describe the First Circuit's continuing violation doctrine with only as much detail as is necessary to show that it is inapplicable to Thomas's claim.

[13] The First Circuit has recognized two different types of continuing violations: systemic violations, which "ha[ve] [their] roots in a discriminatory policy or practice . . . [that] itself continues into the limitation period," *DeNovellis v. Shalala*, 124 F.3d 298, 307 (1st Cir.1997) (quoting *Jensen*, 912 F.2d at 523), and serial violations, which are "composed of a number of discriminatory acts emanating from the same discriminatory animus, [with] each act constituting a separate wrong actionable under Title VII," *id.; see also Mack*, 871 F.2d at 182-84. The systemic violation doctrine is clearly inapposite because Thomas has not alleged that Kodak has "an overarching policy or practice" of conducting discriminatory evaluations. *Jensen*, 912 F.2d at 523. Kodak apparently believes that Thomas is inappropriately attempting to shoe-horn her claim into the serial violation category. This is not so. Whether a serial violation exists does depend in part on a type of notice standard similar to the one in *Johnson. See Sabree v. United Bhd. of Carpenters, Local No. 33*, 921 F.2d 396, 402 (1st Cir.1990) (stating that if an earlier event had "'the degree of permanence which should trigger an employee's awareness and duty to as- **[54]** sert his or her rights,'" then it is not substantially related to the later event, and therefore cannot form part of a continuing violation (quoting *Berry v. Board of Supervisors of L.S.U.*, 715 F.2d

971, 981 (5th Cir.1983))). This similarity may be the source of Kodak's argument. But the serial violation doctrine, like the systemic violation doctrine, stands as an exception to the accrual rule recognized in *Johnson*. The purpose of this exception is to permit suit on later wrongs where a wrongdoer would otherwise be able to repeat a wrongful act indefinitely merely because the first instance of wrongdoing was not timely challenged. *See* D. Laycock, *Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues*, 49 Law & Contemp. Probs. 53, 55 (1986) (comparing the application of the continuing violation doctrine in employment discrimination cases to its application in an antitrust case, *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968), and observing that "[o]bviously, United should not be able to continue its illegal conduct forever because no one challenged it during World War I"); J. MacAyeal, *The Discovery Rule and the Continuing Violation Doctrine as Exceptions to the Statute of Limitations for Civil Environmental Penalty Claims*, 15 Va. Envtl. L.J. 589, 615-22 (1996) (describing the history and purpose of the continuing violation doctrine); *see also Sabree*, 921 F.2d at 401 (discussing proper remedy).

In the Title VII context, the continuing violation doctrine applies where "a number of discriminatory acts emanat[e] from the same discriminatory animus, [with] each act constituting a separate wrong actionable under Title VII." *Jensen*, 912 F.2d at 522. Sexual harassment, failure to promote, and pay inequity cases often fall into this category. Plaintiffs in these cases experience harm from each employer act (e.g., a harassing comment, a denied promotion, or a smaller paycheck), for which they could recover under Title VII. Thus, under the *Johnson* standard, each act could trigger the running of the statute of limitations. The continuing violation

doctrine ensures that these plaintiffs' claims are not foreclosed merely because the plaintiffs needed to see a pattern of repeated acts before they realized that the individual acts were discriminatory.

Thomas's claim presents a different question: not whether she is permitted to bring suit after many repeated harms, but rather whether harm cognizable under Title VII existed at the time she first received her performance appraisals, sufficient to mean that the notice of layoff is not the date on which the limitations period began for her layoff claim. This question is more appropriately addressed under the *Johnson* notice standard.

[14] We consider whether the date on which the limitations period begins to run should be earlier than the notice of layoff because there was earlier concrete harm to Thomas resulting from the performance appraisals. According to Kodak's compensation plan, appraisal scores were intended to affect salary levels and determine "who should be promoted, transferred, demoted, terminated, laid off, and re-employed." It is not clear whether Kodak informed employees of this intention. But even if employees were familiar with the intended possible uses of the scores, it appears that the effects listed in the compensation plan remained abstract—mere possibilities, not certainties.

[15] This was particularly true in Thomas's case. Flannery's appraisals evaluated Thomas's performance as only average or below average. But the appraisals did not specify that Thomas was to suffer an immediate consequence for her alleged performance failures,[9] much **[55]** less that

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[9] Under *Ricks*, we must also consider whether the appraisals led to any other concrete harm for which the layoffs were the "delayed, but

they would mechanically lead to her being laid off. Because Thomas seeks to recover for an allegedly discriminatory layoff, we consider whether that particular consequence was apparent at the time Thomas received the appraisals. *Cf. Colgan*, 935 F.2d at 1410, 1419-20 (finding notice lacking even where an evaluation explicitly warned that adverse actions would be taken if the employee's performance did not improve). She was not told that layoffs were impending and that her scores placed her at high risk for layoff.[10] Even if she did have this information, it would fall short of the "crystallized" implications required under *Johnson*, 840 F.2d at 136, since being at risk for layoff (due to a low ranking rela-

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inevitable, consequence." *Ricks*, 449 U.S. at 257-58, 101 S.Ct. 498. We do not find any evidence of such related harm in the record.

[55] As noted above, it is not clear whether a separate, unrelated harm would also trigger the accrual of Thomas's layoff claim. We need not reach this question. Assuming arguendo that unrelated harms would trigger accrual of Thomas's layoff claim, accrual was not triggered here, because Thomas's appraisals did not in fact result in any tangible, concrete harms at the time they were presented to her. Although Thomas was denied some promotion opportunities during Flannery's tenure, she was not told that she lost those opportunities because of her low performance appraisals; rather, Flannery told her she lacked the proper credentials. Thomas was also not told that her salary would be affected by her low scores, and indeed, it appears that her salary kept pace with the other five CSRs throughout Flannery's tenure as Customer Support Manager.

[10] The compensation plan instructed appraisers not to discuss appraisals in comparative terms, and appraisal scores were not openly discussed among employees. Thus, Thomas had no way to discover this information on her own. Although she knew that her scores were low in comparison to the scores she had received before Flannery became her supervisor, she could not know that they were low in comparison to the scores of other CSRs whom Flannery was evaluating.

tive to other employees) and actually being selected for layoff are two quite different things.

Kodak emphasizes the fact that Thomas refused to sign two of the three performance appraisals. According to Kodak, her refusal to sign "demonstrates that she was dissatisfied with [the appraisals] for some reason" and makes it "evident that she then believed she had been treated unfairly." Appellee's Brief at 18 n.6. A trier of fact could, but need not necessarily, conclude that Thomas had notice of the appraisals' possible racial bias as soon as they were presented to her. However, this fact does not go to the relevant question under *Johnson*'s notice rule: whether Thomas had notice of immediate, tangible consequences of her poor scores. Kodak's argument pertains to notice of bias rather than the notice of harm required under *Johnson*. But notice of bias alone, absent harm, is clearly not sufficient under *Johnson*.[11]

We hold that the performance appraisals Thomas received in 1990, 1991, and 1992 did not trigger the statute of limita-

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[11] Our analysis of the notice-of-harm issue might be different in the context of a hostile environment claim. In that context, we might find that Thomas's low appraisal scores caused some tangible harm as soon as they were presented to her, since Thomas reportedly found the low scores to be "insulting" and "shameful" (and demonstrated this by refusing to sign them). But pinpointing the moment of accrual for a hostile environment claim is a different problem altogether than the one here, since a certain accumulation of discriminatory events or situations is necessary before an employee is expected—or permitted—to bring a hostile environment suit. *See Provencher v. CVS Pharmacy*, 145 F.3d 5, 14-15 (1st Cir.1998) (noting that in some circumstances a plaintiff may be "unable to appreciate that he is being discriminated against until he has lived through a series of acts and is thereby able to perceive the overall discriminatory pattern" (internal quotation marks omitted)).

tions in § 2000e-5(e)(1) at the time they were presented to Thomas, because they did not initially have any crystallized implications or apparent tangible effects. The notice of the layoff is the date on which the limitations period began to run because Thomas's low appraisal scores first resulted in concrete injury in 1993 when they led to her layoff. Since Thomas filed a charge with the EEOC within one hundred and eighty days of her layoff (the shortest possible period imposed under § 2000e- 5(e)(1)), her claim is timely.

B

[56] [16, 17] The second question on appeal is whether a reasonable jury could find, based on Thomas's evidence, that Flannery discriminated against Thomas because of her race when she assigned Thomas's performance appraisal scores. *See* 42 U.S.C. § 2000e-2(a)(1). To reach an answer, we follow the three stages of the "familiar burden-shifting framework," *Mulero-Rodriguez v. Ponte, Inc.*, 98 F.3d 670, 673 (1st Cir.1996), that was first outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and further explained in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67b L.Ed.2d 207 (1981). The three stages can be summarized as follows:

> First, the plaintiff[] must establish a prima facie case that [plaintiff] (1) was within a protected class; (2) met [the employer's] legitimate performance expectations; (3) was adversely affected; and (4) was replaced by another with similar skills and qualifications. Once [plaintiff] do[es] so, the burden shifts to [the employer] to produce a valid and nondiscriminatory reason for the dismissal. In the final stage, the burden shifts back to the plaintiff[] to show that [the

> employer's] stated reason for [plaintiff's] dismissal was false and but a pretext for discrimination.

Mulero-Rodriguez, 98 F.3d at 673 (citations omitted).

[18, 19] We focus particularly on the final stage of the *McDonnell Douglas/Burdine* framework, because we agree with the district court's careful analysis of the first two stages. *See Thomas*, 18 F.Supp.2d at 135. Thomas has established a prima facie case of discrimination by showing that she is a member of a protected class who met Kodak's legitimate performance expectations and was laid off, while Kodak retained persons outside the protected class. *See id.* This created a presumption that Kodak unlawfully discriminated against her. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) (citing *Burdine*, 450 U.S. at 254, 101 S.Ct. 1089). To counter this presumption, Kodak must "articulate some legitimate, nondiscriminatory reason" for its action, *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. 1817, that is, allege "reasons for its action which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action," *Hicks*, 509 U.S. at 507, 113 S.Ct. 2742 (citing *Burdine*, 450 U.S. at 254-55, 101 S.Ct. 1089). At this second stage, the framework imposes on the defendant only a burden of production. The burden of persuasion remains at all times with the plaintiff. *See id.* at 508 (citing *Burdine*, 450 U.S. at 256, 101 S.Ct. 1089). Kodak met its burden of production—and eliminated the presumption that it had discriminated—by contending that its layoff decision was based solely on racially neutral performance appraisal scores. *See Thomas*, 18 F.Supp.2d at 135.

At the third stage of the *McDonnell Douglas/Burdine* framework, the ultimate burden is on the plaintiff to persuade the trier of fact that she has been treated differently because of her race. *See Hidalgo*, 120 F.3d at 335. This burden is often broken into two separate tasks. The plaintiff must present sufficient evidence to show both that "the employer's articulated reason for laying off the plaintiff is a pretext" and that "the true reason is discriminatory." *Udo v. Tomes*, 54 F.3d 9, 13 (1st Cir.1995) (citing *Smith v. Stratus Computer, Inc.*, 40 F.3d 11, 16 (1st Cir.1994)). For expository convenience, this court has sometimes labeled these two findings "pretext" and "plus" and has referred to the First Circuit rule as a "pretext-plus" standard. *See, e.g., Mullin v. Raytheon Co.*, 164 F.3d 696, 699 (1st Cir.1999) (describing the difference between the "federal 'pretext-plus' standard and the Massachusetts 'pretext-only' standard"); *Dichner v. Liberty Travel*, 141 [57] F.3d 24, 30 (1st Cir.1998) (describing the "'pretext plus' approach").

Applying this standard, the district court found that Thomas had met the first part of her burden. It determined that a jury could find that the appraisal scores were objectively unfair or in some sense skewed against Thomas. Accordingly, the court found that "[b]ased only on the evidence presented so far, a reasonable fact finder could determine that Flannery's reasons for lowering plaintiff's [performance appraisal] ratings were pretextual." *Thomas*, 18 F.Supp.2d at 137. As explained below, we agree.

But the court also found that Thomas did not meet the second, "plus" part of her burden: she failed to present evidence to create a genuine issue of fact about whether the allegedly unfair scores were due to her race and not some other factor. *See id.* at 137-38. The court compared the evidence

presented by Thomas, which in the court's view amounted only to evidence of "an unwelcoming office environment," "conspicuously unfair treatment" by Flannery, and "a personality conflict between Flannery and plaintiff," *id.*, with the evidence presented by plaintiffs in other First Circuit cases in which plaintiffs had survived summary judgment:

> In all of these cases, the plaintiff alleged at least one piece of evidence that explicitly referred to plaintiff's membership in a protected class, and stated or implied that this membership was or would soon adversely affect plaintiff's employment prospects. By contrast, in cases where plaintiff fails to make any connection between adverse employment actions and membership in a protected class, summary judgment is granted to the employer, and judgment is affirmed.

Id. at 138. The court granted summary judgment to Kodak because it found that Thomas had failed to "make any connection" between Flannery's actions and her own membership in a protected class. *Id.* In particular, the court found that Thomas failed to present any evidence that Flannery had *expressly* linked the low scores to Thomas's race and that Thomas's evidence of pretext was not "*flagrant*" enough to support a finding of discrimination on its own. *Id.* (emphasis added).

The district court's analysis mischaracterizes the plaintiff's burden at the third stage of the *McDonnell Douglas/Burdine* framework. To clarify the actual nature of that burden, we make a number of points.

[20] First, the labels "pretext" and "plus" must be used with great care. Although it uses the label "plus," the First

Circuit's "pretext-plus" standard "does not necessarily require the introduction of additional evidence" beyond that required to show "pretext," i.e., evidence showing that the employer's articulated reason is false. *Dichner*, 141 F.3d at 30. Plaintiffs may use the same evidence to support both conclusions, "provided that the evidence is adequate to enable a rational factfinder reasonably to infer that unlawful discrimination was a determinative factor in the adverse employment action." *Rodriguez-Cuervos v. Wal-Mart Stores, Inc.*, 181 F.3d 15, 22 n. 5 (1st Cir.1999); *see also Udo*, 54 F.3d at 13.

[21] A corollary is that there can be no mechanical formula at the third stage of the *McDonnell Douglas/Burdine* framework. "The strength of the prima facie case and the significance of the disbelieved pretext will vary from case to case depending on the circumstances. In short, everything depends on the individual facts." *Woods v. Friction Materials, Inc.*, 30 F.3d 255, 260 n. 3 (1st Cir.1994). Other circuits have highlighted the same point: "The sufficiency of the finding of pretext to support a finding of discrimination depends on the circumstances of the case." *Fisher v. Vassar College*, 114 F.3d 1332, 1338 (2d Cir.1997). Moreover, "it is difficult, if not impossible, to say in any concise or generic way under what precise circumstances . . . an inference [of discrimination from a showing of pretext] will be inappropriate." *Aka v. Washington Hosp. Ctr.*, 156 F.3d [58] 1284, 1294 (D.C.Cir.1998). Because discrimination, and discrimination cases, come in many different forms, a case-by-case analysis is always necessary. There can be no rigid requirement that plaintiffs introduce a separate "plus" factor, such as a negative employer comment about the plaintiff's protected class, in order to prove discrimination. Otherwise, the *McDonnell Douglas/Burdine* framework would no longer

serve the purpose for which it was designed: allowing plaintiffs to prove discrimination by circumstantial evidence.[12] *See Smith v. F.W. Morse & Co.*, 76 F.3d 413, 420-21 (1st Cir.1996).

Our second point is related. That "everything depends on the individual facts" means we need to look carefully at the particular type of claim that Thomas is bringing. As we understand Thomas's argument, she alleges a more subtle type of disparate treatment than the type often used to exemplify the operation of the *McDonnell Douglas/Burdine* framework. She does not argue that Kodak has articulated a false reason for her layoff (for example, excessive tardiness) in order to disguise the actual, unrelated reason (her race)—what one might describe as a "truth versus lies" claim—rather, she challenges the racial neutrality of the proffered reason itself. The latter type of challenge is also cognizable as a form of disparate treatment: if an employer evaluates employees of one race less favorably than employees of another race who have performed equivalently, and if race, rather than some other factor, is the basis for the difference in evaluations, then the disfavored employees have been subjected to "discriminat[ion] . . . because of . . . race." § 2000e-2(a)(1).

[22] The "pretext-plus" label may seem inapposite for this type of claim, since the word "pretext" could suggest a conscious lie. But issues of pretext should not be confused with the issue of whether there has been discrimination "because of race." As the Supreme Court has used the term "pretext,"

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[12] This method of proving a Title VII claim is all the more important now than it was when *McDonnell Douglas* was written, since "smoking gun" evidence is "rarely found in today's sophisticated employment world." *Hodgens v. General Dynamic Corp.*, 144 F.3d 151, 171 n. 8 (1st Cir.1998).

the term provides "no justification for assuming . . . that those employers whose evidence is disbelieved are perjurers and liars." *Hicks*, 509 U.S. at 520, 113 S.Ct. 2742. According to the *Hicks* Court, "[t]o say that the company which in good faith introduces such testimony, or even the testifying employee himself, becomes a liar and a perjurer when the testimony is not believed, is nothing short of absurd." *Id.* at 520-21, 113 S.Ct. 2742. The ultimate question is whether the employee has been treated disparately "because of race." This is so regardless of whether the employer consciously intended to base the evaluations on race, or simply did so because of unthinking stereotypes or bias. *See Robinson v. Polaroid Corp.*, 732 F.2d 1010, 1015 (1st Cir.1984) (noting that plaintiffs in a disparate treatment case can challenge "subjective evaluations which could easily mask covert or unconscious race discrimination on the part of predominantly white managers"); *Sweeney v. Board of Trustees of Keene State College*, 569 F.2d 169, 179 (1st Cir.) (permitting a challenge to a decision process in which "bias may often be unconscious and unexpressed"), *vacated on other grounds*, 439 U.S. 24, 24, 99 S.Ct. 295, 58 L.Ed.2d 216 (1978), *aff'd after remand*, 604 F.2d 106, 114 (1st Cir.1979) (noting again that sex discrimination includes "the practice, whether conscious or unconscious, of subjecting women to higher standards of evaluation than are applied to their male counterparts").[13]

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[13] The language in certain other First Circuit cases might suggest that an express and conscious employer intent to discriminate is critical to the third stage of the *McDonnell Douglas/Burdine* inquiry. Cases have stated, for example, that a plaintiff must "elucidate specific facts which would enable a jury to find that the reason given is not only a sham, [59] but a sham intended to cover up the employer's real motive," *Hidalgo*, 120 F.3d at 335 (internal quotation marks omitted), or that in evaluating

[59] The Supreme Court has long recognized that unlawful discrimination can stem from stereotypes and other types of cognitive biases, as well as from conscious animus. Indeed, discussing age discrimination in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993), the Court characterized employer decisions "'based in large part on stereotypes unsupported by objective fact,'" *id.* at 610-11, 113 S.Ct. 1701 (quoting *EEOC v. Wyoming*, 460 U.S. 226, 231, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983)), as "the *essence* of what Congress sought to prohibit in the ADEA," *id.* at 610, 113 S.Ct. 1701 (emphasis added). And the prohibition against this form of disparate treatment is not limited to the context of age discrimination. The Court has interpreted Title VII as "'prohibit[ing] all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin,'" *County of Washington v. Gunther*, 452 U.S. 161, 180, 101 S.Ct. 2242, 68 L.Ed.2d 751 (1981) (quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976)), and has noted that this includes "the entire spectrum of disparate treatment of men and women resulting from sex stereotypes," *id.* (quoting *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978)). Stereotypes or cognitive biases based on race are as incompatible

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the evidence for pretext, "we remember that the issue is not whether [the employer's] reasons to fire [plaintiff] were real, but merely whether the decisionmakers . . . believed them to be real," *Mulero-Rodriguez*, 98 F.3d at 674. But these cases turn on the particular theories advanced by the plaintiffs therein. *See, e.g., Hidalgo*, 120 F.3d at 335 (considering whether a division was shut down for lack of profits or to eliminate an older employee); *Mulero-Rodriguez*, 98 F.3d at 674-75 (examining whether an employer fired plaintiff because of his alleged failure to maintain inventory levels or because of his age and national origin).

with Title VII's mandate as stereotypes based on age or sex; here too, "the entire spectrum of disparate treatment" is prohibited.

The role of such stereotyping has been discussed most thoroughly in that branch of disparate treatment law developed apart from the *McDonnell Douglas/Burdine* framework and known as the *Price Waterhouse* framework. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 239-58, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989); *Smith*, 76 F.3d at 420-22 (comparing the two frameworks). The district court in *Price Waterhouse* found that the employer, an accounting firm, had discriminated against Ann Hopkins by permitting stereotypical attitudes about women to play a role in its decision not to invite her to become partner. *See Hopkins v. Price Waterhouse*, 618 F.Supp. 1109, 1118-19 (D.D.C.1985). On appeal, the employer contended that it could not be liable for disparate treatment because "Hopkins did not prove 'intentional' discrimination on the part of the [decision-making] Board, but only 'unconscious' sexual stereotyping by unidentified partners who participated in the selection process." *Hopkins v. Price Waterhouse*, 825 F.2d 458, 468 (D.C.Cir.1987), *aff'g in part and rev'g in part Hopkins*, 618 F.Supp. at 1113-21. The D.C. Circuit squarely rejected this argument:

> In keeping with [Title VII's remedial] purpose, the Supreme Court has never applied the concept of intent so as to excuse an artificial, gender-based employment barrier simply because the employer involved did not harbor the requisite degree of ill-will towards the person in question. As the evidentiary framework established in *McDonnell Douglas* makes clear, the requirement[] of discriminatory motive in

> disparate treatment cases does not function as a "state of mind" element, but as a method of ensuring that only those arbitrary or artificial employment barriers that are related to an employee or applicant's **[60]** race, sex, religion, or national origin are eliminated.

Id. at 468-69 (footnotes omitted); *see also Lynn v. Regents of the Univ. of Cal.*, 656 F.2d 1337, 1343 n. 5 (9th Cir.1981) ("[W]hen plaintiffs establish that decisions regarding . . . employment are motivated by discriminatory attitudes relating to race or sex, or are rooted in concepts which reflect such attitudes, however subtly, courts are obligated to afford the relief provided by Title VII.").

The court of appeals found it unsurprising that the disparate treatment doctrine focuses on causality rather than conscious motivations, since "unwitting or ingrained bias is no less injurious or worthy of eradication than blatant or calculated discrimination." *Hopkins*, 825 F.2d at 469. If the plaintiff has shown that she was treated less favorably because of her gender, the court said, "the fact that some or all of the partners at Price Waterhouse may have been unaware of that motivation, even within themselves, neither alters the fact of its existence nor excuses it." *Id.*

The Supreme Court upheld this portion of the D.C. Circuit's decision. *See Price Waterhouse*, 490 U.S. at 250-52, 109 S.Ct. 1775 (plurality opinion); *id.* at 259, 109 S.Ct. 1775 (White, J., concurring in the judgment); *id.* at 261, 272, 277-78, 109 S.Ct. 1775 (O'Connor, J., concurring in the judgment); *see also Hopkins v. Price Waterhouse*, 920 F.2d 967, 969 (D.C.Cir.1990) (affirming district court decision after remand from Supreme Court) (noting that this portion of *Hopkins*, 825 F.2d at 468-69, was upheld by the Supreme

Court). The *Price Waterhouse* plurality explained: "In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Price Waterhouse*, 490 U.S. at 249, 109 S.Ct. 1775. The plurality added that "[b]y focusing on [the plaintiff's] specific proof, . . . we do not suggest a limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision." *Id.* at 251-52, 109 S.Ct. 1775.[14]

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[14] *Price Waterhouse* also held that an employer could avoid liability for disparate treatment if it could demonstrate that it would have taken the same action in the absence of the discriminatory motive. *See Price Waterhouse*, 490 U.S. at 237-52, 109 S.Ct. 1775 (plurality opinion). This holding was statutorily overruled by the 1991 Civil Rights Act. *See* Civil Rights Act of 1991 § 107, 42 U.S.C. § 2000e-2(m) ("[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."). The 1991 Civil Rights Act did not overrule *Price Waterhouse*'s application of Title VII to employer decisions based on stereotypical thinking.

In defining those violations of Title VII for which compensatory damages may be awarded, the 1991 Act uses the phrase "unlawful intentional discrimination." 42 U.S.C. § 1981a(a)(1). This phrase merely distinguishes the disparate treatment framework, and other frameworks in which plaintiffs are individually affected, from the disparate impact framework. *See id.* (limiting compensatory damages to actions in which respondents "engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact)"). Cases decided after the enactment of the 1991 Civil Rights Act continue to recognize the validity of claims based on employers' biased or stereotypical thinking. *See, e.g., Galdieri-Ambrosini v. National Realty & Dev. Corp.*, 136 F.3d 276, 289 (2d Cir.1998) (upholding judgment for employer as a matter of law, given insufficient evidence of discrimination, but noting, in case where plaintiff sought compensatory damages, that

[61] The concept of "stereotyping" includes not only simple beliefs such as "women are not aggressive" but also a host of more subtle cognitive phenomena which can skew perceptions and judgments. *Price Waterhouse* highlighted one such phenomenon: the tendency of "unique" employees (that is, single employees belonging to a protected class, such as a single female or a single minority in the pool of employees) to be evaluated more harshly in a subjective evaluation process. *See id.* at 235-36, 109 S.Ct. 1775; *see also Villanueva v. Wellesley College*, 930 F.2d 124, 131 (1st Cir.1991) (discussing possible relevance of plaintiff's status as the sole employee within a protected class). Other types of biased thinking are also widely recognized. *See generally* L. H. Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161, 1186-1217 (1995) (describing varieties of cognitive bias); C. R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 328-44 (1987) (discussing

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"[e]vidence of sexual stereotyping may provide proof that an employment decision . . . was based on gender"); *Bush v. Commonwealth Edison Co.*, 990 F.2d 928, 931-32 (7th Cir.1993) (considering whether plaintiff has produced evidence adequate to show that the employer's subjective determinations "reflect[ed] unconscious racial bias"); *Jenson v. Eveleth Taconite Co.*, 824 F.Supp. 847, 864 (D.Minn.1993) (noting that under *Price Waterhouse* expert testimony regarding sexual stereotyping can be relevant to plaintiff's disparate treatment claim). While the Supreme Court recently considered the mental state necessary for the award of punitive damages under the 1991 Civil Rights Act, *see Kolstad v. American Dental Ass'n*, ___ **[61]** U.S. ___, 119 S.Ct. 2118, 2123-26, ___ L.Ed.2d ___ (1999) (interpreting 42 U.S.C. § 1981a(b)(1), which permits punitive damages where an employer has acted "with malice or with reckless indifference to [the employee's] federally protected rights"), it has not reconsidered *Price Waterhouse*'s conclusion that the phrase "because of" in § 2000e-2(a)(1) is not limited to expressly conscious intent.

forms of racism); *see also* D. Charny & G. M. Gulati, *Efficiency-Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination for "High-Level" Jobs*, 33 Harv. C.R.-C.L. L. Rev. 57, 77-78, 83 (1998) (noting the inability of the market alone to correct the effects of cognitive biases and stereotypes).

[23-25] We make one final general point about the third stage of the *McDonnell Douglas/Burdine* framework: in the context of a motion for summary judgment, courts must be very cautious about sua sponte finding non-discriminatory reasons for apparently disparate treatment. Although the presumption of discrimination has dropped out of the case by the third stage of the *McDonnell Douglas/Burdine* framework, its rationale remains relevant: discrimination, rarely explicit and thus rarely the subject of direct evidence, may be proven through the elimination of other plausible non-discriminatory reasons until the most plausible reason remaining is discrimination. *See Burdine*, 450 U.S. at 254 n. 8, 101 S.Ct. 1089 (noting that "the allocation of burdens" in a Title VII case "is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination"). In this case, for instance, the plaintiff has argued that her appraisal scores were unfairly low because of her race, while the defendant has argued that the scores were objectively fair. By finding that plaintiff has presented enough evidence to suggest that her scores were unfairly low, and then speculating that a personality conflict could be the source of that unfairness, the district court erroneously adopted a third view. *See Thomas*, 18 F.Supp.2d at 137-38. No party in this case has argued that a personality conflict explained any disparity in the scores assigned by Flannery, and the district court should not, at summary judgment, have replaced Kodak's articulated explanation sua sponte with its

own. It may be that a jury (or judge, if no jury trial is claimed) would find at trial that a personality conflict rather than racial bias is the best explanation for any difference in scores. But the question at summary judgment is not which of the possible explanations is most convincing; it is whether the plaintiff has produced enough evidence to raise a genuine issue of fact regarding *her* explanation.

[26] Having clarified the actual nature of the plaintiff's burden under *McDonnell Douglas/Burdine*, we now consider whether Thomas has met that burden. Because the employer here has articulated a non-discriminatory reason for its action, the initial presumption of discrimination creat- **[62]** ed under *McDonnell Douglas/Burdine* has dropped from the case. *See Hicks*, 509 U.S. at 510-11, 113 S.Ct. 2742; *Smith*, 76 F.3d at 421. This leaves the plaintiff with the ultimate burden of proving discrimination. She must produce evidence to create a genuine issue of fact with respect to two points: whether the employer's articulated reason for its adverse action was a pretext and whether the real reason was race discrimination. *See Udo*, 54 F.3d at 13. In other words, she must produce evidence to permit a reasonable jury to conclude both that disparate treatment occurred and that the difference in treatment was because of race. The same evidence may support both showings. *See id.*

[27] The first portion of Thomas's third-stage burden is to produce sufficient evidence to show that she was not evaluated on the same terms as her colleagues, but rather was evaluated more harshly than the other, non-minority CSRs. The district court found that the plaintiff met this portion of her burden: she produced enough evidence to allow a reasonable factfinder to determine that Flannery's reasons for

assigning her scores were "pretextual." *Thomas*, 18 F.Supp. 2d. at 137. We agree.

[28] One strong piece of evidence is the sharp drop in Thomas's overall score (from 6 in 1989 to 3 in 1990) after Flannery became her supervisor. While the drop in score would not demonstrate uneven treatment if Flannery were simply a "tough grader," this does not appear to have been the case. In 1990, when Thomas received a 3, all of the other CSRs whom Flannery graded received either a 5 or a 6.[15] Furthermore, over her three years as supervisor Flannery gave CSRs other than Thomas a number of 7s in individual categories, a score that earlier supervisors characterized as extremely rare or even unheard of.

The drop in Thomas's score from 1989 to 1990 would also fail to demonstrate uneven treatment if it merely reflected a higher standard imposed upon Thomas due to her grade change in 1989. According to Kodak, "the higher the wage grade and salary, the more Kodak expected from the employee." Appellee's Brief at 34. But Thomas presents

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[15] This information comes from a summary chart of performance appraisal scores produced by Kodak. For 1990 Kodak apparently retained only Thomas's appraisal form and the overall scores of the other CSRs; it was unable to produce the other five appraisal forms for 1990. Thomas suggests in a footnote that the summary chart "would be inadmissible pursuant to FRE 1006 since the documents summarized are not so voluminous that a jury could not reasonably review them at trial and because the documents summarized were not produced." Appellant's Brief at 18 n. 3. We do not address this argument, since issues not squarely raised by the parties are considered waived. *See Service Employees Int'l Union v. Local 1199 N.E.*, 70 F.3d 647, 654 n. 7 (1st Cir.1995) (noting that a "cursory footnote" does not suffice to raise an issue (internal quotation marks omitted)). In any event, both Kodak and Thomas rely on the information contained in the chart.

deposition testimony from other supervisors suggesting that there was no such rule, and the scores that Flannery assigned to other Wellesley CSRs seem to bear this out: one CSR who received a grade change in 1991 received a 5 in 1992 after receiving a 6 in 1991 (a drop of only one point rather than three after the grade change), and another CSR who received a grade change in 1991 received a *higher* score the following year (from a 4 in 1991 to a 5 in 1992).

Thomas makes other specific comparisons as well. The strongest of these concern her scores for "quantity of results," which was the most objective of the categories appraised, since it was based directly on the number of machines and installations for which a CSR was responsible. Thomas's scores appear low when compared to the scores for quantity given to other CSRs. In 1990, for instance, Thomas received only a 3 for quantity of results—a below average score—for managing 730 machines and 110 installations, while another CSR, also in the K6 grade, received [63] a 5 for quantity in 1991 for managing far fewer machines (504) and fewer installations (81). Kodak argues that the comparison is "unfair and analytically unsound" because the other employee had been at the K6 grade for many years, and "[s]ustained performance at a higher grade counts for more than a relatively shorter period of performance at the higher grade." Appellee's Brief at 35. This argument might persuade a jury to discount the value of this comparison, but it does not render the comparison meaningless at summary judgment, where Thomas need only produce evidence sufficient to support her contention that her scores were lower than those given to similarly performing non-minority CSRs. *See Molloy v. Blanchard*, 115 F.3d 86, 91 (1st Cir.1997) (noting that "'[e]xact correlation is neither likely nor necessary'" and stating that "'[t]he test is whether a prudent per-

son, looking objectively at the incidents, would think them roughly equivalent.'" (quoting *Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 19 (1st Cir.1989))).

In addition to the performance appraisals themselves, Thomas presents other evidence to show that Flannery treated her differently than she treated the other CSRs. According to Thomas, Flannery used flimsy grounds to prevent her from delivering an important presentation at a Kodak meeting, refused to provide her with computer training, failed to allow her appropriate developmental opportunities, and failed to evaluate her accurately on the basis of her interaction with customers (since she never accompanied Thomas on site in order to observe that interaction, as she did with the other CSRs).

On the whole Thomas has presented enough evidence to survive summary judgment on the question of disparate treatment. Some of Thomas's scores, and particularly the 1990 scores, appear lower than one would expect given her apparent performance level. A reasonable jury, examining the evidence Thomas has submitted, could conclude that Thomas was evaluated more harshly than other, non-minority CSRs supervised by Flannery.

[29] Kodak argues that, even if true, this would not matter, because Thomas would have been laid off anyway. Even if Thomas had received the highest possible score (7) in 1990, Kodak says, her PAR ranking would not have changed: because the PAR formula so heavily weighted the two more recent scores, Thomas would still have had the second lowest PAR score among the CSRs and would still have been selected for layoff. There are two flaws with this argument. First, it ignores the natural implications of a find-

ing that the 1990 scores were unfairly low. To the extent that Thomas's 1990 scores were inappropriately low, a factfinder could infer that her later scores—although higher than her 1990 scores—were inappropriately low as well[16] (and indeed, they were consistently lower than the scores given to the other CSRs, as demonstrated by the performance appraisals that Kodak has produced for 1991 and 1992). Second, Kodak's argument ignores the fact that performance appraisal scores were expressly on a curve. According to Kodak's compensation plan, scores were to be "validated" by reference to an informal supervisor ranking of employees in the group. Thus, if Thomas's scores had gone up, other CSRs' scores might have gone down. Whether accurate scoring of Thomas in relation to the other CSRs would have saved her from layoff is something Thomas must prove at trial. But she has created a genuine issue with respect to this question. Not only has she produced evidence which suggests that Flannery treated her differently and graded her more harshly than the other CSRs, she has also produced evidence to support the claim that her earlier evaluations were a more accurate **[64]** appraisal of her performance: (1) her promotion in 1989 to the K6 grade, which was reserved for "outstanding" CSRs "servicing the largest and/or most sensitive accounts," (2) her salary, which was higher than her seniority would predict, presumably reflecting the fact that Kodak had, over the years, found her performance level to be comparatively high, and (3) the positive comments from customers and from other supervisors, which suggest that she was in fact one of the better CSRs.

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[16] In addition to drawing such an inference, a factfinder might also reach this conclusion—that Thomas's 1991 and 1992 scores were inappropriately low—by relying on the type of direct evidence discussed above with reference to Thomas's 1990 scores.

[30] Our inquiry does not end with this finding, since even the most blatant unfairness cannot, on its own, support a Title VII claim. "Title VII does not grant relief to a plaintiff who has been discharged unfairly, even by the most irrational of managers, unless facts and circumstances indicate that discriminatory animus was the reason for the decision." *Smith*, 40 F.3d at 16; *see also Rodriguez-Cuervos*, 181 F.3d at 21-23. Instead, our focus shifts to the question whether Thomas has produced sufficient evidence to support a finding that the apparent disparity in treatment was due to her race.

As we emphasized above, Thomas can meet her burden with respect to this question using the same evidence used to show unequal treatment. The district court's opinion can be read to say that at this stage the plaintiff must produce what has been called "direct" evidence, such as racially explicit statements. That is not so. There is no requirement that a plaintiff, having shown differential treatment and pretext, must present direct, "smoking gun" evidence of racially biased decisionmaking in order to prevail. Where the disparity in treatment is striking enough, a jury may infer that race was the cause, especially if no explanation is offered other than the reason rejected as pretextual. That is the case here, since Kodak argues that Thomas's scores were objectively fair, not that they were unfair due to a personality conflict, as the district court surmised.

In fact, Thomas does present additional evidence on this point. She describes incidents and situations which suggest that Flannery had a general disregard for her professional abilities and status. It also appears, from the picture that Thomas paints (and which Kodak does not dispute) that Flannery was at times inappropriately upset or angry with Thomas, to the point of behaving unprofessionally. This, in

turn, suggests that she did not respond neutrally to Thomas. A jury might reasonably infer from Thomas's description of these incidents that Thomas's race was an issue for Flannery and that Flannery's evaluations of Thomas were affected by some form of conscious animus or less conscious bias.[17]

Our assessment of the evidence would be quite different if Thomas had been one of several black employees supervised by Flannery, some of whose scores were not low relative to those of the non-minority CSRs. But that was not the case. Thomas was the only black CSR, and one can infer from the evidence that she was also the only CSR who was evaluated unfairly. Given this, it is reasonable to infer that race played a determinative role in the evaluation process—especially since there is also other evidence that Flannery treated Thomas poorly. Indeed, the very fact that Thomas was the only black CSR at the Wellesley office may have increased the likelihood that she would be evaluated more harshly. *See*

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[17] Thomas describes a number of other incidents from her time at Kodak, not involving Flannery, which she believes to have been racially tinged. (These incidents are recounted in note 4 above.) If true, these incidents are unfortunate, but they are not relevant to the issue whether Flannery evaluated Thomas differently because of her race. As a general matter, "[t]he biases of one who neither makes nor influences the challenged personnel decision are not probative in an employment discrimination case." *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 10 (1st Cir.1990). Although "circumstantial evidence of a general discriminatory environment may add 'color' to an employer's decisionmaking process, we have explained that '[p]roof of a general atmosphere of discrimination is not the equivalent of proof of discrimination against an individual.'" *Ruiz v. Posadas de San Juan Assocs.*, 124 F.3d 243, 249 (1st Cir.1997) (quoting *Sweeney*, 604 F.2d at 113). Because the incidents that Thomas describes appear to have been isolated in time and limited in number, and because these incidents did not appear to involve individuals in a position of influence over Flannery, we do not take them into account.

Price Waterhouse, 490 U.S. at 235-36, 109 S.Ct. 1775; *Villanueva*, 930 F.2d at 131.

In the end, Thomas is in a different position than a plaintiff who merely "disagree[s] with [the employer's] assessment of her relative performance." *Compton v. GTE Gov't Sys., Corp.*, No. 93-11383, 1995 WL 791938, at *6 (D. Mass. Dec. 7, 1995), *cited in Thomas*, 18 F.Supp.2d at 136; *see also Blick v. Pitney Bowes Management Servs., Inc.*, No. 93-11573, 1995 WL 791945, at *5 (D.Mass. Dec. 26, 1995) (noting that a plaintiff's mere disagreement with the employer's "assessment of his work attitude . . . is not sufficient to create a triable federal discrimination claim"), *cited in Thomas*, 18 F.Supp.2d at 136. Thomas has presented "evidence from which the trier of fact reasonably could conclude that [her] abilities and qualifications were equal or superior to employees who were retained." *Goldman v. First Nat'l Bank of Boston*, 985 F.2d 1113, 1119 (1st Cir.1993). It is not an "improbable inference[]" or "unsupported speculation," *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir.1990), to further conclude, based on the evidence available at summary judgment, that Kodak failed to recognize this fact because it relied on an evaluation procedure that was tainted by racial bias.

IV

Thomas's claim is timely, and it is based on sufficient evidence to permit a reasonable jury to find that Flannery discriminated against Thomas because of her race when she assigned the performance appraisal scores that led to Thomas's layoff. Accordingly, we reverse the district court's grant of summary judgment and remand for further proceedings consistent with this opinion.

Costs are awarded to appellant.

APPENDIX B

18 F.Supp.2d (D.Mass. 1998)

Myrtle THOMAS, Plaintiff,

v.

EASTMAN KODAK COMPANY,
Defendant.

Civil Action No. 96–10890–WAG.

United States District Court,
D. Massachusetts.

Sept. 22, 1998.

Former employee brought Title VII race discrimination action against former employer. On former employer's motion for summary judgment, the District Court, Garrity, J., held that: (1) Title VII's 300-day period for filing administrative claim was not triggered by employee's performance evaluations; (2) evidence of pretext alone was not enough for employee to survive summary judgment; (3) employee introduced sufficient evidence to support finding that employer's stated reason for her termination was pretextual; and (4) employee failed to introduce sufficient evidence to support finding that the true reason for her termination arose from racial discrimination.

Motion granted.

Marisa A. Campagna, Campagna & Riley, Boston, MA, for Plaintiff.

Jon M. Nelson, Michael A. Fitzhugh, Fitzhugh & Associates, Boston, MA, for Defendant.

MEMORANDUM OF DECISION

GARRITY, District Judge.

Myrtle Thomas ("Thomas"), plaintiff in this employment discrimination case, was laid off by Eastman Kodak Company ("Kodak"), defendant. Kodak selected Thomas for layoff based on her past performance evaluations; since these evaluations were racially biased, plaintiff argues, her layoff was illegal under Title VII of the Civil Rights Act of 1964, Pub.L. No. 88-352, 78 Stat. 259, *codified as amended at* 42 U.S.C. §§ 2000e to 2000e-17 ("Title VII"). Defendant, moving for summary judgment, argues that plaintiffs claims are time-barred or, in the alternative, lacking evidence of racial animus sufficient to reach a jury. The Court finds that plaintiff's claim, while timely, cannot survive summary judgment. We therefore grant defendant's motion.

Facts

In deciding a motion for summary judgment, "we state the facts in the light most favorable to the nonmoving party, indulging all inferences in that party's favor." *Dykes v. Depuy, Inc.*, 140 F.3d 31, 33 (1st Cir.1998). Plaintiff alleges a number of incidents and statements that defendant denies or does not discuss; in deciding this motion, we accept plaintiff's version in all cases.

Plaintiff is a black woman. Kodak hired her in 1974 to work in Rochester, New York. In 1980, Thomas was promoted to Customer Support Representative ("CSR"). She was trained and transferred to the Office Imaging division in the Wellesley, Massachusetts office. Thomas worked in the Wellesley office until she was laid off in March 1993. In July 1993, Thomas filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). The EEOC issued a Right to Sue Letter on February 5, 1996. Plaintiff sued in this Court on May 2, 1996.

CSRs were sales, marketing and customer support personnel. Each CSR supported customers in an assigned territory who owned Kodak copiers and other equipment. CSRs trained customers and other personnel in use and maintenance of Kodak's products, helped salespeople perform installations, and worked to keep customers satisfied with Kodak imaging equipment and service. Six CSRs worked in the Wellesley office. For the thirteen years Thomas there, she was the only black CSR.

In 1993, Kodak decided to implement a reduction in force in its North American office imaging divisions. Kodak planned to eliminate approximately 80-100 positions, including two CSRs in the Wellesley office. To decide whom to lay off, defendant used the Performance Appraisal Ranking process, or "PAR process." The PAR Process was based on each employee's last three Performance Appraisals ("PAs"). Supervisors completed annual PAs for each of their employees. Kodak used the PA, system to "reward each individual's job performance appropriately." Def.'s Summ. J. Mem., Ex. O. Further, defendant "expected supervisors to use appraisals for," among other things, "determining who should be promoted, transferred, demoted, terminated, laid off, and re-

employed." *Id.* The PA included written comments and numerical ratings in several areas. Each employee also received an overall rating, from a low of one to a high of seven. In the PAR process, defendant applied employees' overall ratings to a formula, weighting the most recent two evaluations. Thomas's PAR process number was the lowest in her group; she was laid off along with the second-lowest-rated CSR, a white woman.

Generally speaking, Thomas was a good employee. Before 1990, plaintiff was supervised and evaluated by District Sales Manager Richard Austin, Sales Managers Garrie O'Neill and Katherine Sullivan, and briefly by Customer Service Manager Tim O'Connor. She received positive evaluations, as well as awards and bonuses from Kodak. Her 1988 and 1989 PA ratings were respectively five and six. After her 1989 evaluation, Thomas was given a grade change from K4 to K6, increasing her salary by $19.00 per week without changing her job description.

In 1989, Kodak created the position of Customer Support Manager. When Thomas asked to be considered for this position, she was told she was not at the correct grade level. Instead, Claire Flannery ("Flannery"), who was then working as a secretary, became the Customer Support Manager, and began to supervise the Wellesley CSRs including Thomas. Problems in the working relationship developed between Flannery and Thomas. Plaintiff alleges a series of incidents between the two; we include four examples. When Flannery and Thomas were to give a customer presentation together, Flannery took over the presentation and left no time for Thomas. When Thomas asked what happened, Flannery said she got a little carried away. Flannery scheduled a customer appointment for Thomas, but gave Thomas the wrong time.

Thomas was over two hours late. When plaintiff confronted her, Flannery denied giving the wrong time. Thomas then replayed Flannery's voicemail message to Flannery and others in the office. Flannery finally admitted she was wrong, but refused to write the customer to clarify why Thomas had been late. Flannery did not train Thomas on the office computer as she did other employees. Flannery scheduled meetings and insisted on employees' attendance. On one occasion, when Thomas attempted to leave a meeting to make a customer visit, Flannery became upset and physically blocked the door.

Flannery's gave plaintiff lower PA ratings than had her previous supervisors. Flannery also rated Thomas lower than other CSRs. In 1990, Flannery gave Thomas an overall PA rating of three, citing a failure to file weekly and quarterly reports. Before Flannery took over, CSRs were not required to submit such reports. During Flannery's tenure, none of the other Wellesley CSRs received an overall PA rating below four. Flannery told Thomas she could score no higher than a three because she had recently changed grades. Kodak had no policy that a grade change would result in lower ratings. Thomas refused to sign her 1990 PA, believing it did not fairly reflect her work. In 1991 and 1992, Flannery gave, Thomas increasing PA ratings of four and five. Thomas did not see or sign the 1992 PA. Thomas received pay raises of $30.00 and $29.00 per week in 1991 and 1992.

In addition to her performance reviews, plaintiff submits the following events and situations as evidence of unlawful discrimination. When plaintiff was transferred to Wellesley, Kodak did not fly her to Massachusetts, as it had other transferred employees. Instead, Thomas was told to drive a car that had been requested by Richard Austin, her new supervi-

sor. The car was in disrepair, requiring a new muffler. Though other employees had two weeks in a new location before reporting to work, plaintiff was told to report right away.

As part of plaintiff's move benefits, Kodak provided storage for her belongings. The warehouse burned in 1981, destroying virtually all of Thomas' belongings. Thomas gave Austin an inventory of her losses; in response, he asked, "Are you rich or something?" Before Thomas was reimbursed, another Kodak employee encouraged her to change her inventory listing. Defendant did not reimburse Thomas for five years.

A few months after Thomas began working in Wellesley, she was standing with a group of employees when Austin introduced two visiting sales managers. Austin introduced everyone in the group except Thomas.

In 1983, Thomas passed a co-worker in the hallway outside the department manager's office. The co-worker asked the manager if plaintiff was "here to do the cleaning."

Thomas lost a gold bracelet at work. A co-worker announced finding it just before a sales meeting, as other employees arrived. Thomas claimed the bracelet, and described it at his request. He refused to return the bracelet until he had confirmed that it did not belong to another, white female employee.

Plaintiff believes she was overlooked when Kodak created the Customer Service Manager position. She was studying for a master's degree in business, and had more seniority as a CSR than Flannery, who was promoted.

Timeliness

Defendant first argues that plaintiff's claim is time-barred. Plaintiff's case hinges on the three performance appraisals ("PAs") she received from Flannery. Thomas alleges that Kodak dismissed her because of low numbers on these PAs, and that, Flannery's racial bias lowered these numbers. Defendant argues that, since Flannery completed these PAs before the window of examination allowed by Title VII, plaintiff cannot challenge their validity and thus has no case.[1] Plaintiff responds that defendant waived this argument by omitting it from the answer. *See Zipes v. Trans World Airlines*, 455 U.S. 385, 392-394, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982) (holding Title VII timely filing requirement non-jurisdictional and therefore subject to waiver). Whether defendant's answer sufficiently reserved this argument is a

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[1] The parties disagree on the Title VII window's correct length. We need not resolve the dispute, as both parties would have us reach the same result. Plaintiff filed her EEOC charge within the minimum 180 days of her termination, but more than the maximum 300 days after her most recent evaluation.

Likewise, the 1991 amendments to Title VII do not affect the outcome of this case. Plaintiff received her 1990 and 1991 performance evaluations before the effective date of the Civil Rights Act of 1991, Pub.L. No. 102-166, 105 Stat. 1075, which "effect[ed] a major expansion in the relief available to victims of employment discrimination." *DeNovellis v. Shalala,* 124 F.3d 298 (1st Cir.1997), quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 254-55, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). While use of these earlier evaluations might prevent plaintiff from recovering certain damages, it cannot bar her from establishing liability and winning back pay. Since we dispose of the case before reaching damages, we do not decide the status of the 1990 and 1991 evaluations.

Finally, plaintiff neither alleges a continuing violation nor asks for the Title VII window to be equitably tolled.

question mired in the murky world of civil procedure and responsive pleadings. Since defendant's argument fails on the merits, we do not decide whether its answer language sufficiently preserved the issue.

[1, 2] The Court holds that an employee's receipt of a performance review does not, standing alone, mark the beginning of the 300-day Title VII window of 42 U.S.C. § 2000e-5(e)(1).[2] Since our circuit has not squarely addressed this question, we look for guidance elsewhere. Closest to the facts at bar we find *Colgan v. Fisher Scientific Co.*, 935 F.2d 1407 (3d Cir.1991) (en banc).[3] In *Colgan*, defendant fired plaintiff after a highly negative performance review. Plaintiff filed his EEOC claim in time to challenge his termination but not the performance review. The Third Circuit held the performance review not barred by the 300-day window, stating that "an alleged unlawful employment practice, here the performance evaluation, must have inflicted harm which was or should have been noticed, or it will not have triggered the limitations period." *Id.* at 1418. Although Colgan's performance review graded him "below requirements" and warned that "action will be taken" if he did not quickly improve, *id.*

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[2] In general, we discuss the maximum time period available to Massachusetts plaintiffs. The Commonwealth has its own anti-discrimination agency, and is therefore a "deferral jurisdiction" under Title VII. *Mack v. Great Atl. & Pac. Tea Co.*, 871 F.2d 179, 181-82 (1st Cir.1989). Title VII plaintiffs in deferral jurisdictions have up to 300 days to file with the EEOC. See 42 U.S.C. § 2000e-5(e)(1) (West 1994 & Supp.1998).

[3] Though the *Colgan* majority is on all fours against defendant, the Court's attention was first directed to *Colgan* by defense counsel at oral argument. His reference to this case was a fine example of the professionalism the Court expects from members of its bar.

at 1410, the court found that Colgan did not receive the notice needed to start the limitations period:

> The [review] clearly signaled that Colgan had an opportunity to redeem himself by an improved performance. . . . [defendant] had neither established an official position nor given Colgan explicit notice of its allegedly unlawful employment practice when it reviewed his performance. . . . The performance evaluation had no immediate consequence on Colgan's employment, such as a loss of seniority, nor did it alert Colgan to the possibility that consequences would flow from it without an opportunity for him to improve his performance.

Colgan, 935 F.2d at 1419-1420.[4]

Cases in this circuit, without stating this standard, have conformed to its contours. In *Provencher v. CVS Pharmacy, Div. Of Melville Corp.*, 145 F.3d 5 (1st Cir.1998), the court time-barred plaintiffs sexual harassment gender discrimination claims. Kodak argues that *Provencher* requires time-barring of Thomas' claim here; viewed through the lens of *Colgan*, however, defendant's reliance is misplaced. In *Provencher*, the plaintiff not only should have known, but actually knew that actionable harassment was taking place. The supervisor's actions in *Provencher* were so extreme that plaintiff could be charged with knowledge of harmful sexual harassment.[5] In addition, Provencher himself recognized the

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[4] The *Colgan* court elegantly reconciled the Supreme Court's case law with its ruling, *see id.* at 1415-1421, and we need not repeat its reasoning here.

[5] Plaintiff's female supervisor "called him 'fag,' and 'queer,' said she would make him 'a real man,' fondled herself and disrobed in his pres-

harm which defendant inflicted, at one point taking a leave of absence to recover. Since *Provencher* knew of the harm in question, the 300-day window applied to his claims.

Defendant's citation of *DeNovellis v. Shalala*, 124 F.3d 298 (1st Cir.1997) is similarly misplaced, for two reasons. First, DeNovellis attempted to collect damages under the Civil Rights Act of 1991 for acts that occurred wholly before that law's enactment. *See DeNovellis,* 124 F.3d at 306. Since plaintiff was never fired and lost no wages, he had no pre-1991 claim. Second, the violation DeNovellis alleged—assignment to duties for which he was unqualified, with intent to discredit him in the office—clearly had an "immediate consequence" on plaintiff's employment. Such major employment actions are not included in the *Colgan* standard.

[3] When held to the notice standard explicated in *Colgan* and impliedly followed in First Circuit cases, plaintiff is entitled to avoid the time bar and include in her case all three evaluations used in the PAR. Plaintiff could not, and should not, have known that Flannery's evaluations had inflicted harm on her. Kodak, like many employers, considers performance evaluations to be highly confidential.[6] As a result, plaintiff had no way to compare her evaluations to those of her coworkers. She thus could not realize that her PA numbers under Flannery fell below those of her co-workers, and

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ence, and touched his genital area, among other inappropriate contact." *Provencher,* 145 F.3d at 13.

[6] Kodak so insists on the confidentiality of its PAs that, in discovery for this litigation, it released to plaintiff only PAs with employees' names deleted.

cannot be charged with notice of a possible Title VII violation.[7]

In addition to prevailing under relevant precedent, plaintiff's position takes the only realistic view of the American workplace. Adopting defendant's argument would put an undue burden on employees and the employment relationship, inducing employees to file charges within 300 days of any action that might be discriminatory and that could lead to future negative results. The Supreme Court has expressed concern about the "disruptive implications" of allowing too many challenges to neutral procedures building on past discriminatory acts:

> [a] given plaintiff could in theory sue successively for not being promoted, for being demoted, for being laid off, and for not being awarded a sufficiently favorable pension, so long as these acts—even if non-discriminatory in themselves-could be attributed to [the original, allegedly discriminatory act].

Lorance v. AT & T Technologies, Inc., 490 U.S. 900, 912, 109 S.Ct. 2261, 104 L.Ed.2d 961 (1989). This case is the flip side of the *Lorance* Court's concern. If we apply the time bar to plaintiff's PAs, then we require a given plaintiff

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[7] Though Thomas refused to sign two of the three PAs, she is not therefore charged with knowledge of future harm. The pervasive evidence of a personality conflict between Thomas and Flannery, who wrote the evaluations, could easily explain her refusal to sign. And while Thomas may have been unhappy with her evaluations, so are many if not most employees. We cannot accept that plaintiff's meaningless decision to withhold her signature equals an understanding of the PA's future effects.

to file EEOC charges successively for each performance evaluation, informal feedback from a supervisor, or office rumor, so long as these events-even if nonharmful in themselves—might be informed by racial animus and could someday contribute to a later, harmful result. This requirement would surely disrupt the American workplace at least as much as the successive suits of *Lorance.*

Summary Judgment of Employment Discrimination Claims

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "[T]o defeat a properly supported motion for summary judgment, the nonmoving party must establish a trial-worthy issue by presenting 'enough competent evidence to enable a finding favorable to the nonmoving party.'" *LeBlanc v. Great American Ins. Co.,* 6 F.3d 836, 842 (1st Cir.1993), quoting *Goldman v. First Nat'l Bank of Boston,* 985 F.2d 1113, 1116 (1st Cir.1993).

In applying this standard to plaintiff's motion, we turn to *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and its "familiar burdenshifting framework." *Mulero-Rodriguez v. Ponte,* 98 F.3d 670, 673 (1st Cir.1996). Under that framework, plaintiffs must first establish a prima facie case of discrimination. *See McDonnell Douglas,* 411 U.S. at 802, 93 S.Ct. 1817. In cases arising from reductions in force, plaintiff's prima facie case has four elements. She must establish that she (1) is a member of a protected class, (2) met the employer's legiti-

mate employment expectations, and (3) was laid off. Finally, she must establish that (4) the employer did not treat members of the protected class neutrally, or retained persons outside the protected class in the same-position. *See Udo v. Tomes,* 54 F.3d 9, 12 (1st Cir.1995), citing *LeBlanc v. Great American Ins. Co.,* 6 F.3d 836, 842 (1st Cir.1993).

Plaintiff has established her prima facie case of discrimination. The plaintiff's prima facie burden in Title VII cases is "not onerous." *Mesnick v. General Elec. Co.,* 950 F.2d 816, 823 (1st Cir.1991). The first and third elements are obviously satisfied. While Kodak argues that Ms. Thomas' performance was not as good as that of her co-workers, defendant does not contend that plaintiff failed to meet legitimate job expectations; the second element is therefore undisputed. The fourth element is met because, after the layoff, the four CSRs in the Wellesley office were uniformly white.

Once plaintiff establishes her prima facie case, *McDonnell Douglas* shifts the burden of production to the defendant. "Under the *McDonnell Douglas* scheme, '[e]stablishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee.'" *Hicks,* 509 U.S. at 506, 113 S.Ct. 2742, quoting *Texas Dept. of Community Affairs v.* Burdine, 450 U.S. 248, 254, 101, S.Ct. 1089, 67 L.Ed.2d 207 (1981). To meet this burden, defendant must allege "reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." *Hicks,* 509 U.S. at 507, 113 S.Ct. 2742, citing *Burdine,* 450 U.S. at 254-255, n. 8, 101 S.Ct. 1089. While the burden of production shifts to the defendant, the ultimate burden of persuasion remains at all times with the plaintiff.

See Hicks, 509 U.S. 507, 113 S.Ct. 2742, citing *Burdine*, 450 U.S. at 253, 101 S.Ct. 1089.

Defendant has met its burden of production. The defense argues that plaintiff was fired because her PAR ratings were below those of her retained co-workers, and her ratings were lower because her performance was itself below their level. Defendant does not call plaintiff a poor performer, saying only she was not rated as well as the employees it retained. Indeed, plaintiff does not contend that Kodak's PA system, or its PAR layoff process, were themselves discriminatory. Defense has alleged a legitimate, nondiscriminatory reason for plaintiff's layoff, satisfying its *McDonnell Douglas* burden.

"'If the defendant carries the burden of production, the presumption raised by the prima facie case[] is rebutted,' and 'drops from the case.'" *Hidalgo v. Overseas Condado Insurance Agencies, Inc.*, 120 F.3d 328, 334 (1st Cir.1997), quoting *Hicks*, 509 U.S. at 507, 113 S.Ct. 2742. The burden then returns to plaintiff one more time, and "'merges with the ultimate burden of persuading the court that . . . [the plaintiff] has been the victim of intentional discrimination.'" *Hidalgo*, 120 F.3d at 335, quoting *Burdine*, 450 U.S. at 256, 101 S.Ct. 1089. To prevail, plaintiff must demonstrate that she lost her job (1) not because of defendant's proffered reason, but (2) instead because of illegal racial discrimination. *See Udo v. Tomes,* 54 F.3d 9, 13 (1st Cir.1995). While this test has two distinct prongs, plaintiff may use the same evidence to support both conclusions. *See id.*

Plaintiff argues she need present only evidence of pretext to defeat summary judgment reach the jury. This argument cannot prevail, however, as it was squarely rejected by the

Court of Appeals in *Woods v. Friction Materials, Inc.*, 30 F.3d 255 (1st Cir.1994). The EEOC, amicus curiae in *Woods*, argued that the Supreme Court in *Hicks* eliminated the need to present evidence of discriminatory animus on summary judgment. *See Woods,* 30 F.3d at 260 n. 3. In *Hicks,* the Court of Appeals held that, if the factfinder found pretext in defendant's explanation for an employment action, judgment must go to the plaintiff. *See Hicks v. St. Mary's Honor Center*, 970 F.2d 487, 493 (8th Cir.1992). Reversing, the Supreme Court noted in dicta that the factfinder could conclude, though it was not so required, that evidence of pretext was by itself enough:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by suspicions of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such, rejection, "no additional proof of discrimination is required."

St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), quoting *Hicks*, 970 F.2d 487, 493 (8th Cir.1992) (footnote omitted). In *Woods,* the EEOC argued that, in order for the factfinder to have the choice the *Hicks* Court described, evidence of pretext alone must allow plaintiffs to survive summary judgment. *See Woods,* 30 F.3d at 260 n. 3. The Court of Appeals disagreed, holding instead that:

> [T]he Supreme Court envisioned that some cases exist where a prima facie case and the disbelief of a pretext could provide a strong enough inference of actual discrimination to permit the fact-finder to find for the plaintiff. Conversely, we do not think that the Supreme Court meant to say that such a finding would always be permissible. . . . The strength of the prima facie case and the significance of the disbelieved pretext will vary from case to case depending on the circumstances. In short, everything depends on the individual facts.

Woods, 30 F.3d. at 260 n. 3. The Court of Appeals followed *Woods* in *Barbour v. Dynamics Research Corp.*, 63 F.3d 32 (1st Cir.1995). *In Barbour*, the plaintiff again argued "that *Hicks* precludes summary judgment where there is sufficient evidence to conclude the defendant's proffered reasons are a pretext." *Barbour*, 63 F.3d at 38. The court held this argument "foreclosed by our decision in *Woods*. . . ." *Barbour*, 63 F.3d at 39. Citing the *Woods* language quoted above, the court held that "whether the plaintiff relies solely on his prima facie case and evidence of pretext or has additional evidence of specific intent as well, the plaintiff must always adduce evidence sufficient for a rational jury to conclude that the employer's action was motivated by an intent to interfere" with a protected right. *Id.*

[4] In light of the Court of Appeals' statements in *Woods* and *Barbour*, we agree with other courts in this District that, even on summary judgment, "[e]vidence of pretext alone is not enough." *Compton v. GTE Government Systems Corp.*, No. 93-11383, 1995 WL 791938, at *4 (D.Mass. Dec.7, 1995); *see also Blick v. Pitney Bowes Mgmt. Svcs., Inc.*, No. 93-11573, 1995 WL 791945, at *4 (D.Mass. Dec.26, 1995),

Wooster v. Abdow Corp., No. 94-30060, 1996 WL 131143, at *3 (D.Mass. March 21, 1996). We therefore hold that to survive summary judgment, the plaintiff must introduce sufficient evidence to support two additional findings: first, the defendant's stated reason for the adverse job action was pretextual, and second, the true reason arose from racial discrimination. *See Smith v. Stratus Computer, Inc.*, 40 F.3d 11, 16 (1st Cir.1994), citing *Woods v. Friction Materials, Inc.*, 30 F.3d 255 (1st Cir.1994). Here, plaintiff must allege credible reason to decide that she lost her job not only because Flannery unfairly lowered her performance appraisals, but also that Flannery was motivated by racial animus.

Application of standard to plaintiff's case

[5] The plaintiff met the first part of her burden. Based only on the evidence presented so far, a reasonable fact finder could determine that Flannery's reasons for lowering plaintiff's PA ratings were pretextual. The immediate and sharp drop in plaintiff's PA rating under Flannery, together with evidence of a personality conflict between Flannery and plaintiff, is probably sufficient ground for such a determination.

[6] The second, racial animus portion of plaintiff's burden is a different story. In determining whether the facts of this case reach the legal threshold needed to survive summary judgment, we look to previous employment discrimination cases decided in this circuit. The cases listed in the following paragraphs are in the same procedural posture as the one at bar, and confront substantially similar issues. They were all decided on summary judgment motions by defendant employers. In each of these cases, the plaintiff made a prima facie case of discrimination, the defendant introduced a non-

discriminatory reason for the adverse job action, and the plaintiff introduced evidence of pretext sufficient to survive summary judgment. The cases thus turned on whether the plaintiff could introduce sufficient evidence that the true reason for the adverse job action was impermissible discrimination.

In *Brennan v. GTE Government Systems* Corp., 150 F.3d 21 (1st Cir.1998) the Court of Appeals reversed the District Court's granting of defendant employer's motion for summary judgment.[8] Plaintiff introduced statistics as evidence of discriminatory animus: in the RIF affecting plaintiff, "younger engineers received preference in the distribution of new computers and new assignments, [and] a high proportion of older persons were discharged and ranked low in the rating and ranking . . ." *Brennan*, 150 F.3d at 30. In addition, plaintiff introduced evidence that, when he approached his supervisor about the layoff, the supervisor said, "I was told it wouldn't matter to you guys." *Brennan*, 150 F.3d at 25. Plaintiff alleged that the supervisor meant "you guys" to mean older employees, and referred to early retirement benefits to which he mistakenly believed the older employees were entitled. *See id.*

In *Mulero-Rodriguez v. Ponte*, 98 F.3d 670 (1st Cir.1996), the Court of Appeals reversed summary judgment for the defendant. Plaintiff had alleged age and national origin discrimination. The national origin discrimination decision hinged on a comment, made by employee Caceiro, that plaintiff was the only Puerto Rican running a Cuban company. *See id.* at 675. The district court found that Caceiro

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[8] The District Court ruled that plaintiff failed to establish a prima facie case, *see id.* at 25, so the Court of Appeals considered for the first time the issues of pretext and discriminatory animus.

was not in a position to influence decisions made about the plaintiff's job. The Court of Appeals disagreed, and held this comment sufficient evidence of national origin discrimination. As a result of this change, the Court of Appeals reversed the District Court's dismissal of the national origin discrimination claim. Plaintiff's age discrimination claim again came down to one remark, this time by Ponte, one of the owners. Eight months before plaintiff's discharge, Ponte said that plaintiff was "too old to handle" supervision of salespeople. *Id.* at 76. The District Court found this statement too remote from the actual termination. The Court of Appeals disagreed, finding a nexus between this remark and an employment act negative toward plaintiff—changing the company's bonus structure to one based on merit, not seniority. Again, as a result of this change, the Court of Appeals reversed the District Court's dismissal of the age discrimination claim.

In *Woodman v. Haemonetics Corp.*, 51 F.3d 1087 (1st Cir.1995), plaintiff sued under ADEA for wrongful termination. After receiving glowing performance reviews, plaintiff suddenly received a bad evaluation and was soon terminated. On summary judgment, plaintiff introduced evidence that his supervisor, Mary LeBlanc, had said of upper management: "These damn people—they want younger people here." *Woodman*, 51 F.3d at 1090. The District Court held this remark inadmissible as multiple hearsay and, considering the record without it, granted defendant's motion for summary judgment. *See id.* at 1090. The Court of Appeals found that LeBlanc's statement was not hearsay and, considering the record including it, reversed the District Court decision. *See id.* at 1094. Allowing consideration of LeBlanc's statement was the only evidentiary change by the Court of Appeals.

In all of these cases, plaintiff alleged at least one piece of evidence that explicitly referred to plaintiff's membership in a protected class, and stated or implied that this membership was or would soon adversely affect plaintiff's employment prospects. By contrast, in cases where plaintiff fails to make any connection between adverse employment actions and membership in a protected class, summary judgment is granted to the employer, and the judgment is affirmed. *See, e.g., Hidalgo v. Overseas Condado Insurance Agencies, Inc.*, 120 F.3d 328 (1st Cir.1997), *Udo v. Tomes*, 54 F.3d 9 (1st Cir.1995).

Thomas does not produce this crucial evidence. She successfully alleges unfair treatment by her supervisors, principally Flannery. She produces evidence that may indicate racial animus among her co-workers, chiefly the "cleaning the floor" remark and the bracelet incident. She cannot, however, show a connection between the remarks by her co-workers and the actions of her supervisors. Assuming all facts for the plaintiff, she faced an unwelcoming office environment coupled with conspicuously unfair treatment by her immediate supervisor. We have found no cases in this circuit where evidence of unfair treatment alone, without any explicit evidence of discriminatory animus, allowed plaintiff to survive summary judgment.

[7, 8] Plaintiff's own belief and contention that racial animus was the root of her employment troubles cannot suffice to carry her burden. "Even in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the non-moving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir.1990), citing *Rossy*

*v. Roche Prod*ucts, *Inc.*, 880 F.2d 621, 624 (1st Cir.1989); *Oliver v.* Digital Equipment Corp., 846 F.2d 103, 109-10 (1st Cir.1985). While powerful evidence of flagrant pretext may, by itself, support a finding of discrimination, *see Hicks,* 509 U.S. at 507, 113 S.Ct. 2742, plaintiff has not produced such evidence.

[9] "Title VII does not grant relief to a plaintiff who has been discharged unfairly, even by the most irrational of managers, unless the facts and circumstances indicate that discriminatory animus was the reason for the decision." *Smith v. Stratus Computer*, 40 F.3d 11, 17 (1st Cir.1994), citing *Mesnick*, 950 F.2d at 825. The facts in this case, read most favorably to plaintiff, do not support such a finding. The Court therefore grants defendant's motion for summary judgment.

SO ORDERED.

APPENDIX C

[A. 417] UNITED SATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MYRTLE THOMAS	*
Plaintiff	*
	*
vs.	* CIVIL ACTION
	* No. 96-10890-WAG
EASTMAN KODAK COMPANY	*
Defendant	*
	*

BEFORE THE HONORABLE W. ARTHUR GARRITY
UNITED STATES SENIOR DISTRICT JUDGE
SUMMARY JUDGMENT HEARING
September 10, 1998

APPEARANCES:

LAW OFFICES OF MARISA CAMPAGNA, (By Marisa Campagna, Esq.), 101 Tremont Street, Boston, Massachusetts 02108, on behalf of Plaintiff

FITZHUGH & ASSOCIATES, (By Michael Fitzhugh, Esq., and Jon Nelson, Esq.), 155 Federal Street, Boston, Massachusetts 02110, on behalf of Defendant

Courtroom No. 7
Post Office & Courthouse Bldg.
Boston, Massachusetts 02109

James P. Gibbons, CSR, RPR, RMR,
Official Court Reporter
7205 Courthouse Way
Boston, Massachusetts 02110

[A. 425] it to discrimination cases, what that means is that every time an employee gets a performance appraisal that they don't like, they can run over to EEOC and file a charge. That is not true. The cause of action arises when there is some act that gives rise to something that lets the plaintiff know that there is something wrong.

When that performance appraisal was given to the plaintiff, she had no information about how other people were treated in their performance appraisals. She had no idea that that document would, or how it ever could, be used as a consequence of her employment. The discriminatory act was firing her. It was based on the poison fruit that was put in place three years before in '90, '91 and '92. The fact that the paper trail started more than 300 days before does not prevent her from using that paper trial.

Kodak further says that they based the selection of her for termination on those very three documents. They have brought those documents back to life. They have performed the CPR that brings them back within the statute. They have said they were not, like in the Shalala case that they cite, a discrete act that is over and done with. They put them in her personnel file. They kept them in her personnel file and they used them in 1993 to fire her.

So since they were used to fire her in 1993, the . . .

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MYRTLE THOMAS, Plaintiff	))CIVIL ACTION NO.
v.	)
EASTMAN KODAK COMPANY, Defendant	)

PLAINTIFF'S COMPLAINT

JURISDICTION AND PARTIES

1. This Court has original jurisdiction pursuant to 42 U.S.C. § 2000e-5(f) and 28 U.S.C. § 1331 and 1343(4).

2. All conditions precedent to jurisdiction pursuant to 42 U.S.C. § 2000e-5(f)(3) have been met.

3. A charge of employment discrimination was timely filed with the Equal Employment Opportunity Commission ("EEOC"). A copy of the Charge is attached hereto as Exhibit "A" and incorporated herein.

4. Notification of Right to Sue dated February 5, 1996 was received from the EEOC. A copy of the Charge is attached hereto as Exhibit "B" and incorporated herein.

5. Plaintiff, Myrtle Thomas ("Thomas"), is an adult, Black citizen of the United States and is a resident of Attleboro, Massachusetts.

6. Defendant, Eastman Kodak Company ("Kodak"), is a corporation with a principal place of business in Rochester, New York which is authorized to and doing business in Massachusetts.

7. At all times relevant to this lawsuit, Thomas was an employee within the meaning of 42 U.S.C. § 2000e, et seq. ("Title VII").

8. At all times relevant to this lawsuit, Kodak was an employer within the meaning of Title VII.

FACTS

9. In 1974, Thomas was hired by Kodak in its Rochester facility in a clerical position.

10. Thomas became a customer service representative and, in 1980, was transferred to the Wellesley, Massachusetts facility of Kodak.

11. Thomas worked as a customer service representative in Wellesley until March 1993.

12. Thomas' job performance was always good and she received several awards during her employment with Kodak.

13. During at least ten (10) years of her employment, Thomas was the only minority customer service representative in the department.

14. Thomas was denied employment opportunities that were made available to white employees.

15. Thomas was not given pay increases as often as pay increases were given to white employees.

16. Thomas was subjected to degrading comments and actions by Kodak personnel because of her race.

17. Thomas was the victim of other adverse employment decisions and actions because of her race.

18. In March 1993, Thomas was terminated from her employment with Kodak.

19. Kodak's stated reason for the termination was that it was laying employees off.

20. In other departments where employees were being laid off, the decision of which employees would be laid off was based on seniority.

21. If the layoffs in Thomas' department had been made on the basis of seniority, Thomas would not have been terminated.

CAUSE OF ACTION

22. Kodak's actions and failures to act as set forth above are a violation of Title VII.

23. As a result of the discriminatory treatment, including without limitation her termination, Thomas has suffered lost wages, loss of income due to denial of employment opportunities and emotional distress.

24. Kodak is liable to Thomas for the full amount of her damages.

WHEREFORE, Plaintiff, Myrtle Thomas, respectfully demands judgment in her favor and against Defendant, Eastman Kodak Company, for the full amount of her damages as proved at trial together with interest, costs and reasonable attorney's fees.

Plaintiff demands a trial by jury on all claims so triable.

PLAINTIFF
MYRTLE THOMAS

By her Attorney,

/s/

Marisa A. Campagna BBO #552692
101 Tremont Street
Boston, Massachusetts 02108
(617) 338-1101

Dated: May 2, 1996

APPENDIX E

Volume: I
Pages: 1-243
Exhibits: 1-10

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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	x	
	x	
MYRTLE THOMAS	x	
	x	
vs	x	No. 96-10890-MLW
	x	
EASTMAN KODAK COMPANY	x	
	x	
	x	

Deposition of MYRTLE THOMAS, taken on behalf of the Defendant, pursuant to the applicable provisions of the Federal Rules of Civil Procedure, before Valerie T. Wong, Notary Public within and for the Commonwealth of Massachusetts, at the offices of Fitzhugh & Associates, 155 Federal Street, Boston, Massachusetts, commencing at 10:09 o'clock a.m. on Friday, May 29, 1998.

Valerie T. Wong & Associates
Registered Professional Reporters
P. O. Box 3076
Boston, Massachusetts 02101
(781) 324-1420

[20] her last name.

Q. Nancy was a customer service rep and she was transferred from Rochester to Boston?

A. I believe so.
She was flown.

Q. She was flown?

A. Everyone was flown.
Angelina Jaspers.

Q. Who is she?

A. Angelina was a customer support rep, then became a sales rep.

Q. She was transferred from Rochester to Boston?

A. As far as I know.

Q. Is there anyone else you can think of?

A. There are several. But I can't recall the names.

Q. As far as you know, you are the only customer support rep who was transferred from Rochester to Boston who had to drive; is that correct?

A. As far as I know.

Q. Did you complain to anyone about having to drive to Boston?

[21] A. Did I complain?

Q. Yes.

A. No, I did not.

Q. Why not?

A. I was told that I needed to drive a car to Boston. That is what I did.

Q. Who told you to drive the car?

A. They said Austin wanted a car that was in Rochester to be brought down –

MS. CAMPAGNA: Listen to the question. Who told you?

THE WITNESS: I don't remember the name.

Q. Do you remember the person's position?

A. I don't. I believe they were in transportation. I don't remember.

Q. In any event, someone told you, we have a car in Rochester that we need to have moved to Boston?

A. Someone told me that Austin wanted me to drive a car from Rochester to Boston.

Q. You don't remember who that person was?

A. No, I don't.

Q. Did you ever talk to Dick Austin about his

[32] for several years. I had no feedback from Kodak. Approximately four or five years afterward, when Gary O'Neil started with the company, I went to him and I asked him -- I told him what had happened. He couldn't believe that had actually taken place. And he said he would get involved.

It was at that time that the process started on. And it was during the negotiations that the inventory had come up. I did not actually present an inventory. I believe he had the inventory and he asked me about it, asked me if I was rich or something.

Q. This was several years after the fire had occurred?

A. That's correct.

Q. Had you approached Mr. Austin about the matter or had he come to you to talk about it?

A. I approached Dick in the interim when nothing was happening. I approached Dick and I approached Phil Cassidy, who was Dick's boss. I approached him at a sales meeting that we had attended and he said he would look into it. I never heard back from him.

Q. When did that meeting take place?

[33] A. It was approximately a year after the accident happened.

Q. Mr. Austin's comment to you, are you rich or something?

A. Yes.

Q. Is it your contention that is somehow a racially motivated statement?

A. I wouldn't think he would say it to anyone else.

Q. Why?

A. I have no idea.

Q. Did you say anything in response to his statement to you?

A. I just looked at him and said, "What you see are the facts."

Q. Did he say anything else to you?

A. I don't remember.

Q. Did you speak to anyone else about what Mr. Austin said to you or

A. I didn't talk to anyone.

Q. You were laid off from Kodak as part of a downsizing activity; is that right?

A. That's what I was told.

Q. Do you disagree with that?

[41] Q. After the meeting you then went and got your belongings and left; is that correct?

A. I may have hung around for a few minutes.

Q. Did you talk to anyone else at Kodak after your meeting with Mr. Schalberg?

A. Other employees, I may have.

Q. Do you remember who you spoke to?

A. No, I don't.

Q. Were you aware of anyone else who was being laid off after your meeting with Mr. Schalberg on that same day?

A. I may have.

Q. Someone else was laid off; is that correct?

A. Yes.

Q. How many more people were laid off at the same time?

A. In my department?

Q. Yes.

A. Two.

Q. Who were they?

A. Claire Flannery.

Q. What was her title at the time?

A. She was the manager.

[42] Q. Manager of customer support representatives?

A. Customer support.

Q. The other person?

A. Eileen Lavallee.

Q. She was also a customer support representative?

A. Correct.

Q. Did you speak with either Ms. Flannery or Ms. Lavallee after your meeting with Mr. Schalberg?

A. I don't remember.

Q. Did you ever go back to the Kodak office in Wellesley after that day, after the day of your meeting with Mr. Schalberg?

A. I did.

Q. When did you go back?

A. I had a meeting with Patti Weissinger.

Q. When did that meeting occur?

A. I don't remember the date.

Q. Was it within a couple of days of the layoff?

A. I believe so.

Q. Where did that meeting take place?

A. In the Wellesley office.

[48] A. That is correct.

Q. She was your supervisor at the time?

A. That is correct.

Q. Was this the first performance appraisal you were given that had been prepared by Claire Flannery?

A. I believe so.

Q. Is there any portion of that 1990 performance appraisal, which is now Exhibit 3, with which you disagree?

A. Absolutely.

Q. Tell me what you disagree with.

A. The entire performance appraisal.

Q. Can you be any more specific? Let's take quality of results, the first item.

A. Yes.

Q. You were rated a three, correct?

A. I disagree.

Q. I understand you disagree.
Why do you disagree with that?

A. Because the quality of the results that I -- that the work that I did did not deserve a three.

Q. Quantity of results is also a three?

A. I disagree.

[49] Q. Why is that?

A. Because I performed superior work and did not deserve a three.

Q. Job skills, you have a four rating. Do you disagree with that?

A. I do.

Q. Why?

A. I had been doing the same job for many years and surpassed what was required of me. Was never told that I had a deficiency in any of these areas.

Q. Is it your position that ratings of three and four indicated deficiency?

A. When I look at this that tells me that there is something wrong.

Q. 1990, or the period covered by the 1990 performance appraisal, was your first year at the K6 level; is that correct?

A. I believe so.

Q. What does K6 mean?

A. I don't know.

Q. It is a designation, you are not sure what it means exactly; is that right?

A. Correct.

[55] Isn't she saying to you that you are doing the job?

A. It was also used to lay me off.

Q. This was one of the performance appraisals that is considered?

A. As far as I know.

Q. Did you complain to anyone besides Ms. Flannery about the 1990 performance appraisal?

A. I may have complained to -- I don't remember.

Q. You don't remember if you complained or you don't remember to whom you might have complained?

A. I don't remember at the time who I -- if I complained to someone.

Q. You are not sure whether you complained at all?

A. I don't remember.

Q. Was there someone you could have complained to back in 1990 about the performance appraisal?

A. Not that I know of.

Q. On the second page of the performance appraisal there is a notation at the bottom that **[56]** says, "Myrtle would not sign," and it is dated 5-23-90. Do you see that?

A. I am seeing it now.

Q. You obviously did not sign this appraisal?

A. Obviously.

Q. Why did you not sign the performance appraisal?

A. I did not agree with it.

Q. You said that when you were promoted from a K4 to a K6 you did receive more money; is that right?

A. I received a raise. But I don't know if it was because of that promotion or was it my regular raise.

Q. Did you receive a raise in 1990?

A. I did not receive a raise in 1990.

Q. The raise would have been in 1989 when you were made a K6?

A. I believe so.

Q. It was about $20, you said?

A. I believe so.

Q. On the second page of the performance appraisal, under additional measures and summary comments, it says, "Although Myrtle's verbal

[79] A. Yes.

Q. I am showing you a copy of the 1991 performance appraisal. If you would just take a look at that and see if you recognize it.

(1991 performance appraisal, marked Exhibit No. 4.)

Q. Do you recall seeing the 1991 performance appraisal?

A. Yes.

Q. The overall rating for 1991 was a four; is that correct?

A. Yes.

Q. Did you disagree with anything in this 1991 performance appraisal which is marked as Exhibit 4?

A. I disagreed with the results.

Q. With the overall rating?

A. Yes.

Q. And all of the other ratings?

A. Yes.

Q. Why don't you tell me what you disagree with.

A. I disagree with quality of results being a four. I disagree with quantity of results being a [80] five. I disagree with job skills being a four. I disagree with teamwork being a five. I disagree with the performance measures; dependability being a four, versatility a four, communications a four.

Q. I should have asked you, do you agree with anything in the 1991 performance appraisal.

A. I do not agree.

Q. You do not agree with anything on it?

A. No.

Q. You did sign this performance appraisal; is that right?

A. I did.

I said, "I am signing this out of a joke," because it was a joke. I said that to Claire. It was not a fair evaluation.

Q. Because the numbers are too low?

A. The numbers were low. It was insulting. It was -- all they did was go up one notch.

Q. What did you think the rating should have been, the overall rating?

A. I wanted to be evaluated based on the work that I do, not because of her -- she never traveled with me so she could not have evaluated my work. The numbers that I submitted did not match quantity

[85] Q. She only traveled with you the one time?

A. That is correct.

I asked her on that occasion because of that particular feature the customer had.

Q. After the 1991 performance appraisal, did you talk to anybody else within Kodak about your concerns?

A. With the exception of speaking with Patti and Bill Cassidy, I may have spoken with my peers. I'm not sure.

Q. Do you remember any conversations with any of your peers about the 1991 performance appraisal?

A. About my appraisal?

Q. Yes.

A. I don't think I discussed my appraisal with anyone because it is -- I thought it was a joke. And it was quite shameful, especially after number three. I couldn't do anything right for this woman.

Q. You mean the 1990 appraisal by three?

A. I couldn't even...

Q. The 1991 appraisal is higher than 1990?

A. By one. It was (Indication).

Q. After you got this 1991 appraisal, did you **[86]** talk to anyone at Kodak about it?

A. The --

Q. The 1991.

A. I don't remember. I don't think so.

Q. You don't remember complaining to anyone about Claire's ratings of you?

A. I don't remember.

Q. Was there anyone you could have gone to to talk about the 1991 performance appraisal other than Claire Flannery?

A. I don't know if -- I may have -- I don't even know who her boss was at the time.

Q. Was her boss in Wellesley?

A. I don't think so.

Q. Rochester?

A. I believe at the time it was Rochester. I don't remember.

Q. As a result of the 1991 performance appraisal, did you receive a raise, a pay raise?

A. In --

Q. In 1991.

A. I don't remember. I did not get a raise on one of these. I believe it was the 1990. And I may have received a raise on the 1991. I can't be **[89]** been doing. I was taking on responsibilities and I was doing that here and I was doing that here (Indication).

MS. CAMPAGNA: Again, the witness is referring to Exhibits 4 and 5.

Q. Although the ratings on the 1992 performance appraisal could have been higher, I understand that is what you believe, you feel that 1990 and 1991 should have had similar ratings as well?

A. Absolutely.

Q. Did you tell Claire Flannery that?

A. I certainly did.

Q. Did she say anything in response?

A. She said that was the way things were. That was it.

Q. Did she offer any other explanation to you?

A. No, she did not.

Q. The overall rating on 1992 is a five?

A. Yes.
If you notice, they all go up in increments of one.

Q. Did you sign the 1992 performance [90] appraisal?

A. I'm not sure.
No, I did not.

Q. Why did you not sign it?

A. Because I felt that I was not being fairly evaluated.

Q. Did you receive a raise in 1992?

A. I don't remember. I believe that was the year I was laid off.

Q. You were laid off in 1993.

A. I don't remember.

Q. Did you discuss the 1992 performance appraisal with anyone other than Claire Flannery?

A. I don't believe so.

I don't usually discuss my performance appraisals. we were told not to.

Q. Who told you not to?

A. That is company policy from the time I started. Your performance appraisal was...

Q. Do you know whether the policy is meant to prevent you from discussing appraisals with anyone at the company?

A. I don't know. I took it to believe your performance appraisal was between you and your **[102]** voice mail. And Eileen Putnam was one of the secretaries and, I believe, Meredith. She is no longer there. I don't remember her name. She was another one of the secretaries.

Q. Meredith Coombs?

A. Yes.

We were at their station retrieving our messages. Dick Austin and the management team had just come back from lunch. Dick brought -- they came up to where we were and he introduced the group to - and I will never, until the day I die, forget this - to Angelina Jaspers, to Eileen, to Meredith, and he never introduced me. I was standing right there. I was standing right there. He never introduced me. And from that day I felt like this high (Indication) in Dick's eyes.

Q. When did this occur?

A. This was in 180, when I first came to Boston.

Q. How long had you been there when this happened?

A. I may have been there a few months.

Q. Did you ever talk to Dick Austin about that?

A. How do you talk to someone about that? **[103]** No, I never talked to him about that.

Q. Did you talk to anybody about it?

A. Never. I held everything in. I never felt I had an outlet.

Q. What about Angelina Jaspers, did you speak to her?

A. I didn't talk to her.

I was just so floored by what had happened. I had never been so blatantly mistreated. I don't know how to describe it.' It was a very blatant way to treat someone. It was not a very nice thing to do.

Q. Had you met Mr. Austin before this?

A. He was my manager. He was my district manager. Yes, I did.

Q. You had talked to him before?

A. Absolutely.

Q. Do you know why he didn't introduce you?

A. I don't know.

Q. You said this is Mike Murray?

A. The national sales manager.

Q. How long were these people in your presence before leaving?

[107] Q. Yes.

A. He was talking to me and to Gary. He was leaving as I was coming in. He made the comment and then he laughed and left.

Q. He laughed?

A. He left.

Q. Did you say he laughed and then he left?

A. He laughed and then he left.

Q. Do you know why he made the comment?

A. No, I don't.

Q. Had he ever said anything like this to you before?

A. Not that I recall.

Q. Had he said anything like that to you after the incident?

A. No.

Q. What did you do after you heard him say this?

A. Nothing.

Q. What did Mr. O'Neil do?

A. At the time, nothing. But he did speak with Steve sometime afterward. He told me he spoke with Steve.

Q. Did you ask Mr. O'Neil to speak with Mr. [108] Nordheim

A. I didn't. He did it on his own.

Q. Was Mr. O'Neil laughing at the comment?

A. No, not that I remember.

Q. Did he say anything to you about it at the time?

A. At the time of the incident?

Q. Yes. Did Mr. O'Neil say anything to you?

A. I know he spoke with me about the incident. But I don't remember if it was at the time it happened or after he spoke with Steve Nordheim.

Q. What do you remember Mr. O'Neil saying to you?

A. He did tell me he spoke with Steve Nordheim and he does not appreciate those comments. He told him that he didn't want to hear that again.

Q. Did you ever speak to Mr. Nordheim after the incident?

A. He spoke with me, yes.

Q. What did he say to you?

A. He apologized.

Q. How long after the incident did Mr. Nordheim apologize to you?

[109] A. I don't remember.

Q. Was it a week?

A. It is possible.

Q. Could have been longer or less than a week?

A. It could have been less.

Q. Did he offer any explanation as to why he said it?

A. No.

Q. How did you take the remark?

A. I was hurt. But I didn't -- it was not the end of the world.

Q. Did you interpret the comment to be something racial?

A. Yes, it was.

Q. Did you interpret the comment to be something referring to your gender?

A. Not referring to my gender.

Q. Why do you think it was racial as opposed to something related to gender?

A. I think it was more racially motivated simply because most of the cleaning people in the building were black. All the cleaning people were black.

[110] Q. You have no idea, why he came out with this comment at the time?

A. I have no idea.

Q. Had you said anything to him before?

A. Before he said it?

Q. Right.

A. No. I was walking in the door and he was walking out.

Q. Do you know if Steve Nordheim is still with Kodak?

A. I don't know.

Q. Do you know if he was laid off in 1993?

A. I don't know.

Q. Did you mention this incident to anyone else?

A. No.

Q. You also recount an incident in your answers to interrogatories regarding a gold bracelet. Do you remember that?

A. Yes.

Q. You are referring to a Keith LoBeck?

A. Yes.

Q. Who is a sales manager?

A. Yes.

[113] Eileen Bamberry?

A. He must have. He did not give me the bracelet until afterward

Q. How much later?

A. When Eileen came in.

Q. Did he say anything to you at that point when he did give you the bracelet?

A. He just gave me the bracelet. I didn't wait around to hear anything from him. I was not very pleased with that.

Q. I understand you didn't wait around.

Did he say anything to you when he gave you the bracelet?

A. No. He just gave it to me and he -- he did say -- I may have said to him, "Are you sure that it is not Eileen's?" He said, "Yeah. I talked with Eileen and it is not hers."

Q. Do you allege this is a racially motivated action or statement on Mr. LoBeck's part?

A. If that weren't, I don't know what is.

Q. Had you ever had any run-ins or problems with Mr. LoBeck before this incident?

A. No.

Q. Had you had any problems with him after [114] the incident?

A. No.

Q. Did you speak to anyone else about the incident involving Mr. LoBeck?

A. No. But it was done in front of the entire group of people who were there for the meeting.

Q. Who was there?

A. It was a sales meeting. It was everybody.

Q. All the customer support --

A. And sales. People were trickling in at different times.

Q. You did not discuss the incident with anyone else?

A. No, I did not.

Q. You say in your answers to interrogatories that, in talking about the 1990 performance appraisal, other employees who had received grade changes had not been given lower ratings in the years when they received their grade changes.

A. Would you try that again?

Q. In 1990 or 1989 you were promoted from K4 to K6, correct?

A. In --

[142] wrong time for a training session?

A. Yes.

Q. Were there any other incidents where she interfered with a relationship with a customer?

A. I know of an incident when we -- I took her -- the one time that she traveled with me was to Deloitte Touche. She was doing the special training of the features. She had the knowledge. And she was only supposed to do that portion of the training and I was supposed to do my regular portion. She just took over everything. I was there to do my job, and I just had to stand back and wait until Claire did her Claire thing. And that was that.

Q. Did you ever talk to her about that?

A. I did. I did after the meeting, after that.

Q. What did you say?

A. I asked her why she did what she did. said, "I thought I was supposed to do the training. This is my customer." She said, "I got a little carried away," or something to that effect. "Since I had started, began on that, I just continued."

Q. Did you talk to anybody else about that **[143]** incident?

A. No, I didn't.

Q. Do you believe that any of those incidents we talked about where you believe she interfered with your relationships with clients are motivated by some sort of racial animus?

A. I believe they were done to make me look inadequate and to make me look unprofessional. And could be racially motivated. Could be construed as that, yes.

Q. Why do you believe that?

A. Because, as I said, I was the only employee of color and I did not see her demonstrate the same actions to the others.

Q. Did you ever go see her train with any other customer support representatives?

A. Have I tagged along, no.

Q. It is the fact you were the only minority customer support representative at the time that leads you to believe her actions were racially motivated?

A. Please repeat it.

Q. You have said you believe Claire Flannery's actions toward you were racially

[166] the presentation?

A. There were written -- I had transparencies, overheads.

Q. Did you pass any of the written materials out to people?

A. I never got that far. It never got to that point. When Janine Paul was finished with her presentation, Claire came over and said "Myrtle, there won't be time for your presentation."

Q. What happened to your training materials, the written materials and everything? Were they ever distributed to the people in attendance?

A. No. The meeting adjourned and we went our separate ways. She said maybe another time I will present it. That other time never came.

Q. Did you talk to Claire at all after that about the incident?

A. No, I did not.

Q. Did you talk to anybody else about the incident?

A. I don't believe I did. I don't remember.

Q. You said that you complained to Bill Cassidy and to Patti Weissinger about the treatment you received while a customer support

[180] A. I believe one was HR. I don't remember his name. And one was -- I don't know who it was.

Q. You don't remember the name of this guy from Rochester?

A. I don't remember.

Q. Do you know --

A. Jerry somebody.

Q. Jerry?

A. Yeah. It is probably not that name.

Q. Do you have any idea what his job was at Kodak?

A. I think he said he was some kind of human relations -- he led me to believe he was there more as an advocate for me. When the meeting was set up with Dick Austin that is the way he set it up.

Q. Did he give you any indication why he wanted you to change your inventory or your statement?

A. No. He wanted me to -- he basically wanted me to accept the fact that my things had been -- the things I said I had, he wanted me to say -- he wanted me to say the things I had, that I didn't have or something to that effect.

Q. Did you ever mention this person to anyone [181] else? Did you ever complain about it?

A. No. When my fire happened I rarely spoke about it, as I do about other things. I generally don't because these are very painful. That was a very painful experience.

Q. Go ahead.

A. That's all right.

Q. The meeting with this guy from Rochester, Jerry or whatever his name was, this occurred about five years later?

A. Yeah. It was during the time -- in the year that all this was now finally -- because Jerry had reopened, if you will.

Q. We are roughly about '85?

A. Yes.

Q. You didn't go talk to anyone about what happened?

A. I had no one to speak with.

Q. Were you ever paid for your possessions that you lost?

A. Five years later.

Q. Who paid you?

A. Kodak.

Q. They paid you about $50,000, did you say?

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MYRTLE THOMAS,
Plaintiff

v. CIVIL ACTION NO.
96-10890-MLW

EASTMAN KODAK COMPANY,
Defendant

PLAINTIFF'S ANSWERS TO THE FIRST SET OF INTERROGATORIES FROM DEFENDANT

Plaintiff, Myrtle Thomas, ("Thomas"), hereby responds to the First Set of Interrogatories from the Defendant, Eastman Kodak Company ("Kodak"), as follows:

INTERROGATORY NO. 1

Please identify yourself by full name, date of birth, social security number, current address and current occupation.

ANSWER TO INTERROGATORY NO. 1

Myrtle Thomas, May 21, 1952, 134-48-8010, 25 Adamsdale Road, South Attleboro, Massachusetts, unemployed.

INTERROGATORY NO. 2

Please describe in full and complete detail each and every act of discrimination committed by or on behalf of the defendant, being certain to identify each and every person you believe has or may have information regarding your allegation.

ANSWER TO INTERROGATORY NO. 2

In June 1980, I was slated to move to Boston. I was told that I had to drive a company car from Rochester to Boston. The car was in disrepair and the muffler fell off in the parking lot where the car was left for me. Kodak's usual procedure is to provide air transportation to employees who are required to relocate. Employees who were transferred before me and employees who were transferred after me were routinely offered air transportation. I am not aware of any employee who was ever asked to drive to their new location.

All employees were given two weeks to settle in before reporting for work but I was required to report to work immediately. I was the only minority employee in my department for ten years.

While working in Buffalo, Kodak arranged to have my possessions transported to Boston and placed in storage. As a result of a warehouse fire in 1980, I lost everything. When my supervisor, Dick Austin, saw the inventory list, he said to me, "Are you rich or something?" The company paid for rental furniture for a period of time but otherwise did nothing to address the problem for 5 years.

Finally, I told Garrie O'Neil, who reported to Austin, about the situation. He was shocked to hear about it and re-opened the case. It was settled in 1985. Austin told me that he was told to do nothing but would not say who gave him this instruction. When a white employee, Betty O'Reilley, stated that she was concerned about safety at about the same time, Kodak hired a security company shortly after the complaint was made.

When Mike Murray, a national sales manager and Phil Cassidy, regional sales manager came to the site, Austin approached a group of employees consisting of me and Engelina Jaspers, Eileen Bamberry (Putnam) and Meredith Coombs, all of whom are white. Austin introduced the managers to everyone except me.

When O'Neil came on board, he held one-on-one meetings with the employees in the department. When I came to meet with him, Steve Nordheim was leaving O'Neil's office and said as we passed each other, "Is she here to clean the floor?"

I wore a gold bracelet to work and lost it during the course of the day. Keith LoBeck, a sales manager, found the bracelet. At a meeting, he asked if anyone had lost a bracelet and I said that I had. He asked me to describe the bracelet, which I did, and he refused to return the bracelet until he asked Eileen Bamberry (Putnam), a white female employee if the bracelet belonged to her.

I worked for Kodak for 19 years and always received excellent performance appraisals except for 1990, when I received a rating of 3. This appraisal was used in selecting employees for layoff. My appraisal that year was done by Claire

Flannery who had not been my supervisor for the entire appraisal period. She did not travel with me as she did with the other, white employees to observe my interaction with customers. On one occasion, Flannery traveled with me to a customer but instead of observing me in conducting the training, she did the training herself.

I was told by Flannery that since I had received a grade change the previous year, I could not be given a grade higher than 3 because I was moved to a higher grade and had to be given a developmental grade rating.

My job description and responsibilities had not changed. Other employees who had received grade changes had not been given lower ratings in years when they received their grade changes. If there was a policy, I was not aware of it ever being imposed on other employees. My ratings for that year were unfairly low based on my actual job performance and my performance as compared to other employees. I refused to sign the evaluation.

During 1989 and 1990, Bamberry and I were selected to go to New York and receive training on two new pieces of equipment. We did this and then provided training on the equipment to the sales, CSR and management personnel. I received excellent feedback for my work on this project from my manager, Tim Connor. In her evaluation, Bamberry was praised for her work on the project. Flannery, who was working as a secretary during this project and only became my manager a few months after the project was completed and was permitted to do my performance appraisal, barely mentioned my accomplishments on my evaluation.

One evaluation stated that I lacked computer skills. At the time, CSR's did not use computers in the performance of our jobs and there were no computers in the workplace available to us. When one did become available, Flannery trained Bamberry and Nancy Brooks but not me.

In addition, when layoffs were necessary in other departments, the seniority system was used. Layoffs in my department were based on job performance and, despite my excellent job performance, I was chosen for layoff. Throughout my employment, I received awards, some raises and was highly regarded by co-workers and customers.

When I was laid off, I was not offered a job elsewhere in the company although there were three territories open in the Boston area at the time. In 1990, I applied for a job in human resources and was never even contacted or interviewed.

Lisa Fallon who is white, was working as a secretary. When that position was eliminated, she was kept on doing work for Austin. After my layoff, she was given my job in my territory even though she had no prior relevant experience.

Flannery was hired for the position of support manager even though I had more seniority and more experience. I was working on my master's degree in Training and Development for Business and Industry. I was told that I was not eligible to advance to a management position from my grade level. Flannery was working as a secretary at the time of her promotion and had not worked as a CSR for three years.

Flannery intentionally interfered with my working relationship with my customers. She told me the wrong time for

a training session she had scheduled at one site and when I was late, the customer became upset. She refused to write to the customer to explain that I was not to blame making me appear unprofessional.

Flannery tried to prevent me from going to an appointment with a customer because she had scheduled a meeting at the same time. She told me that her meetings were more important that the needs of the customer.

Flannery also tried to prevent me from meeting with Bill Cassidy. She told me that his schedule was full. I was able to schedule a meeting. While I was waiting to meet with him, Flannery came by and started to scream at me and to prevent me from meeting with him.

When a management position became available in the Central Equipment Service Division, Flannery told me I was not eligible because I did not have a master degree. None has a masters degree, most do not have bachelors degrees.

I was denied opportunities given to white employees. I was not given developmental opportunities in the same way they were given to white employees. I complained to Flannery. I was given one that involved a great deal of work with the credit being given to the sales representative in the territory. These developmental opportunities were used in the performance appraisals.

I was not given a grade change for seven years while white employees were given grade changes more often than that. I was not given pay increases at the same rate as white employees.

I was told that I would be permitted to make a presentation regarding new information at a meeting of Kodak personnel. I was placed last on the agenda and was told at the end of the meeting that there was no time for the presentation that I had prepared. A white co-worker was allowed to make a presentation at the meeting that involved a manual that was already in use and involved no new information.

I complained to Bill Cassidy and Patti Weisinger about the treatment I received. No effective action was ever taken. I also spoke to Bob Schalberg about my layoff.

INTERROGATORY NO. 3

Please describe in full and complete detail each and every act of harassment committed by or on behalf of the defendant, being certain to identify each and every person you believe has or may have information regarding your allegation.

ANSWER TO INTERROGATORY NO. 3

See Answer to Interrogatory No. 2.

INTERROGATORY NO. 4

Please identify in full and complete detail each and every employee of the defendant whom you contend discriminated against you or evinced a discriminatory animus, being certain to include a full and complete description of what each such employee did or said, and identify all persons you believe have or may have information regarding your allegations.

ANSWER TO INTERROGATORY NO. 4

See Answer to Interrogatory No. 2.

INTERROGATORY NO. 5

Please identify in full and complete detail:

(a) the date that you contend the defendant or any of its employees first committed an act of unlawful discrimination, or and act that manifested discriminatory animus;

(b) when you first became aware that the aforesaid act(s) were unlawful, discriminatory, or were motivated, in whole or part, by unlawful discriminatory animus; and

(c) if the dates are not identical, describe or explain any interim period between the first act of unlawful discrimination and your discovery of such discriminatory animus or motivation.

ANSWER TO INTERROGATORY NO. 5

While I knew that insulting comments and unfair actions had been taken by Kodak personnel during my employment, it was not until after my layoff that I was able to gather sufficient information and documentation to make a determination that I had been subjected to racial discrimination.

INTERROGATORY NO. 6

If, at any time during your employment with the defendant, you complained to anyone regarding your allega-

tions of discrimination or harassment, please state the date(s) of each such complaint, to whom you made each such complaint, whether it was oral or written, any follow-up communication regarding any such complaint, and the result of any such complaint.

ANSWER TO INTERROGATORY NO. 6

See Answer to Interrogatory No. 2.

INTERROGATORY NO. 7

If you contend that the defendant permitted any of its employees to engage in any discriminatory acts toward you, please state all facts and events upon which you base such contention, being certain to identify each and every person you believe has or may have information regarding your allegations.

Signed under the pains and penalties of perjury this 24th day of August, 1997.

/s/
Myrtle Thomas

AS TO OBJECTIONS:

PLAINTIFF,
MYRTLE THOMAS
By her Attorney,

/s/
Marisa A. Campagna BBO # 552692
101 Tremont Street
Boston, Massachusetts 02108
(617) 338-1101

Dated: August 27, 1997

CERTIFICATE OF SERVICE

I, Attorney for Plaintiff hereby certify that I, this day, served a copy of the within document(s) by (hand) (~~first class mail, postage prepaid~~) to all counsel of record.
Date: 8/27/97

/s/
Marisa A. Campagna

APPENDIX G

UNITED STATES CODE

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 21 - CIVIL RIGHTS
SUBCHAPTER VI - EQUAL EMPLOYMENT OPPORTUNITIES

Sec. 2000e-5. Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor

organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the omission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and,

so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a)[1] of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

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[1] So in original. Probably should be subsection "(b)".

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority

to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respon-

dent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may

deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment

practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent dem-

onstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court –

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) Provisions of chapter 6 of title 29 not applicable to civil actions for prevention of unlawful practices

The provisions of chapter 6 of title 29 shall not apply with respect to civil actions brought under this section.

(i) Proceedings by Commission to compel compliance with judicial orders

In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals

Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, title 28.

(k) Attorney's fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.